(1)

Supreme Court, U.S.
FILED

05-216 JUL 29 2005

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

DEBRA DANTZ,
PETITIONER

v.

AMERICAN APPLE GROUP, LLC

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CHRISTY BISHOP
Counsel of Record
THOMPSON & BISHOP
2719 Manchester Road
Akron, Ohio 44319
(330) 753-6874
Attorneys for Petitioner

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 333-3140 ♦ USSCINFO.COM

QUESTIONS PRESENTED FOR REVIEW

1. An at-will employee and her employer must reach a mutual agreement to arbitrate employment claims, manifested by a "clear and unmistakable waiver" standard.

2. Waivers of the right to trial by jury in the at-will employment setting must be "knowing and voluntary."

3. If there is any question of contract formation under the FAA, then it must be resolved pursuant to a limited trial by jury, as dictated in § 4 of the FAA, applying principles of state law.

4. *Arguendo*, if an agreement to arbitrate is found, the voluntary invocation of a federal court's jurisdiction by removal constitutes a waiver of any right to an arbitral forum when a case is originally filed in a court of competent jurisdiction able to decide the issue of arbitrability.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE AND FACTS 1

REASONS FOR GRANTING THE PETITION 13

CONCLUSION 25

APPENDIX

CIRCUIT COURT OPINION (03/01/05) 1a

DISTRICT COURT ORDER (07/21/03) 18a

STATUTORY PROVISIONS INVOLVED 47a

TABLE OF AUTHORITIES

CASES

BENJAMIN V. PIPOLY, 155 OHIO APP.3D 171 (10TH DIST. 2003) 22

CIRCUIT CITY STORES V. ADAMS, 532 U.S. 105 (2001) 13

COUNCIL OF SMALLER ENTERS. V. [illegible]ES, MCDONALD & CO., 80 OHIO ST. 3D 661 (1998) 22

EEOC V. WAFFLE HOUSE, INC., 534 U.S. 279 (2002) 15, 17

FIRST OPTIONS OF CHICAGO, INC. V. KAPLAN, 514 U.S. 938 (1995) 14, 22

GIBSON V. NEIGHBORHOOD HEALTH CLINICS, 121 F.3D 1126 (7TH CIR. 1997) 21

GILMER V. INTERSTATE/LANE JOHNSON CORP., 500 U.S. 20 (1991) 13, 18

HARDWICK V. SHERWIN WILLIAMS CO., 2003 OHIO 657 23

KELLY V. MEDICAL LIFE INS. CO., 31 OHIO ST.3D 130 (1987) 23

LAPIDES V. BD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, 535 U.S. 613 (2002) 24

MASTROBUONO V. SHEARSON-LEHMAN HUTTON, INC., 514 U.S. 52 (1995) 17, 18

PATTERSON V. TENET HEALTHCARE, INC., 113 F.3D 832 (8TH CIR. 1997) 16

PRUDENTIAL INS. CO. OF AMERICA V. LAI, 42 F.3D 1299 (9TH CIR. 1994) 16

PRYNER V. TRACTOR SUPPLY CO., 109 F.3D 354 (7TH CIR. 1997) 15, 19

SARBAK V. CITIGROUP GLOBAL MARKETS., INC., 354 F. SUPP. 2D 531 (D.N.J., 2004) 16

SEUS V. JOHN NUVEEN & CO., INC., 146 F.3D 175 (3D CIR. 1998) 16

SHAFFER V. ACS GOV'T SERVS., 321 F. SUPP. 2D 682 (D. MD., 2004) 16, 19

TRUMBULL V. CENTURY MARKETING CORP, 12 F.SUPP.2D 683 (N.D. OHIO. 1998) 19

VOLT INFORMATION SCIENCES, INC. V. BOARD OF TRUSTEES OF LELAND STANFORD JUNIOR UNIV., 489 U.S. 468 (1989) 17

WALKER V. RYAN'S FAMILY STEAK HOUSES, INC., 400 F.3D 370 (6TH CIR. 2005) 16

WISCONSIN DEP'T OF CORR. V. SCHACHT, 524 U.S. 381 (1998) 24

WRIGHT V. UNIVERSAL MARKETING SERVICES CORP., 525 U.S. 70 (1998) 13, 18, 21

MISCELLANEOUS

9 U.S.C. § 3 ..... 1, 14

9 U.S.C. § 4 ..... 1, 11, 22

28 U.S.C. § 1441 1

28 U.S.C. 1254(1) 1

29 U.S.C. § 151 20

29 U.S.C. § 206(b) 1

42 U.S.C. 2000 21

H.R. Rep. No. 485 20

O.R.C. 4112.02 ..... 1, 13

OPINIONS BELOW

The March 1, 2005 opinion of the United States Court of Appeals for the Sixth Circuit is unreported, and cited as 123 Fed. Appx. 702, 2005 U.S. App. LEXIS 3454 (6th Cir. March 1, 2005), and is reprinted at Appendix (App.) 1a. The July 21, 2003 order of the United States District Court for the Northern District of Ohio, Eastern Division is cited as 277 F. Supp 2.d 794 and is reprinted at App. 18a.

STATEMENT OF JURISDICTION

The Sixth Circuit issued its decision on March 1, 2005; the Petitioner petitioned for an additional 60 days in which to respond, which was granted by this Court. Petitioner has timely filed this petition within 180 days of March 1, 2005. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of the Federal Arbitration Act, specifically (FAA), 9 U.S.C. § 3 , 9 U.S.C. § 4, 28 U.S.C. § 1441, 29 U.S.C. § 206(b), O.R.C. 4112.02 *et seq.* and 4112.99. The statutory provisions are reprinted at App. 47a.

STATEMENT OF THE CASE AND FACTS

Petitioner Debra Dantz is a single mother of two adopted daughters. She has a high school education. For most of her adult life she was married and a homemaker. In 1999 her husband divorced her, which became final in approximately 2000, and left her to raise her two

daughter alone. Her ex-husband disappeared from the picture and never paid child support, nor did she have funds or a pension from which to draw. She had no car. In addition, her father was dying of cancer at the time and she was trying to care for him.

In August 2000 Petitioner, who had virtually no working experience, began working as a server at Applebees restaurant in Chapel Hill, Ohio, which was owned and operated by Respondent. At that time, Respondent did not have any sort of "Dispute Resolution Program" or arbitration agreements with its employees.[1]

From the start, Petitioner was subjected to severe and pervasive mistreatment by the restaurant's general manager, who was also her direct supervisor. The manager groped, sexually harassed and ridiculed Petitioner, and encouraged other male workers to do so as well. On slow days he would force her to sit in the middle of the restaurant, sometimes for over an hour, while he circled her, staring at her. He and fellow managers berated her in front of customers, such that co-workers and even some customers complained on her behalf. Petitioner herself complained numerous times both verbally and in writing about the harassment, but to no avail.[2]

---

[1] Respondent is headquartered in Cleveland, Ohio and operates Applebees franchises in Ohio, Indiana, Delaware, and Seattle.

[2] Other women workers at the restaurant were also harassed, though none as severely as Petitioner. Respondent was well aware of conditions at the restaurant due to many complaints about the hostile environment at the restaurant, both on its anonymous "help" line and directly to headquarters, yet did nothing.

The manager required Petitioner to work six days per week from open to close – while "zeroing out" her hours on the computer time-keeping system so that she only made tips. In turn, he received manager bonuses from Respondent's corporate headquarters for "keeping labor costs down." Petitioner's yearly income was less than $10,000 despite the number of hours she worked.

Petitioner's financial situation and lack of a car required that she find unskilled employment within walking distance of her home; she also needed the rudimentary health benefits Respondent offered. The Chapel Hill Applebees restaurant was near enough that she could reach it on foot. When she returned from work each night, she slept on the floor of her home because she did not own a bed. (Her teenage daughters shared the lone bed and finally pooled their allowances together over a year's time to buy Petitioner a bed for Christmas 2001).

The manager was aware of her financial situation and continued to exploit it. Petitioner complained numerous times to other managers at the restaurant, to the District Manager over the harassing manager, and to corporate headquarters. Her complaints continued to be ignored. However, the manager and other male workers at the restaurant began to retaliate against her for complaining about them by threatening and intimidating her. For example, they began to fling food at her when she entered the kitchen, held up her orders, and consistently gave her the worst working stations. The manager began cutting down her hours while still zeroing them out, so that she made fewer dollars in tips.

Nonetheless, Respondent did nothing. Indeed, it continued to employ the manager at the restaurant even

after it was aware of his conduct. When confronted, the manager admitted to "zeroing" Petitioner's hours and falsifying payroll information, and also to having a cocaine problem. It was widely known at Respondent's headquarters that he was extremely temperamental, unpredictable, and used intimidation as part of his "management style."[3]

In Fall 2001, Respondent adopted a "Dispute Resolution Program," ("DRP") which was a progressive four-step process for resolving disputes with the Respondent, including: 1) "Communication" (talking to one's supervisor and progressively upward); 2) "Executive Review" (company's president or designee becomes involved); 3) "Mediation"; and 4) "Arbitration."

In September 2001, the Respondent claims it distributed a letter from the management company president (who was not the owner of the company or employer of the employees) stating that Respondent was adopting the "forthcoming" arbitration program, that the employees would receive specific information about it soon, and that the employees would "manifest their assent to the agreement by continued employment" if they showed up to work on October 1, 2001 – despite not having any information about the DRP at all. Moreover, as it turns out in subsequent litigation, the Respondent falsely stated the management company's letter (which became known in litigation as the "Strang memorandum),

---

[3] The manager was transferred a few months after Petitioner filed suit and then was ultimately fired for "altering payroll records." At the initial case management conference before the district court, the Respondent admitted it had an "exposure" on Petitioner's wage claim.

was actually distributed to employees, when in fact it had not been distributed.[4]

Later in September 2001, Respondent distributed booklets to Chapel Hill Applebees employees, which explained the DRP. However, the last two pages of the booklet, which were designed to be torn out or removed and saved as executed instruments for the Respondent, comprised an "*Agreement and Receipt for Dispute Resolution Program.*" The booklet contained a six-page discussion of the process for using the four steps of the DRP and laid out the types of claims covered by binding arbitration. The first page of the Booklet stated:

> THIS PROGRAM IS A CONDITION OF YOUR EMPLOYMENT AND IS THE MANDATORY AND EXCLUSIVE MEANS BY WHICH THOSE PROBLEMS MAY BE RESOLVED, SO READ THE INFORMATION IN THIS PROGRAM BOOKLET CAREFULLY.

Nowhere did the booklet or the two-page agreement state that the DRP requirements were automatically effective if the employee continued her employment after the date of receipt, nor did it explain that the employee was expected to quit her employment if she rejected its terms.

---

[4] Respondent was basically free in this case to invent its defense, since the district court denied Petitioner her discovery rights on the issue of formation. She was able to obtain the proper information in a later federal proceeding but the Sixth Circuit refused to consider it, despite knowing there was a much more developed – and reliable – record. See *Dantz v. Apple American Group*, N.D. Ohio, No. 5:04 CV 0060.

More important, the attached agreement made acceptance of the DRP elective. The agreement spelled out the actual terms of the "mutual promise to arbitrate" and expressly required signatures of both the employee and an authorized company officer in order to be effective.

The agreement stated, in pertinent part (emphasis added):

> **MUTUAL PROMISE TO RESOLVE CLAIMS BY BINDING ARBITRATION**
>
> In signing this Agreement, both the Company and I agree that all legal claims or disputes covered by the Agreement must be submitted to binding arbitration . . . . I understand and agree that by entering into this Agreement, I anticipate gaining the benefits of a speedy, impartial dispute resolution procedure.
>
> This procedure is explained in the Dispute Resolution Program Booklet, which I acknowledge I have received and read or have had an opportunity to read.
>
> * * *
>
> **SOLE AND ENTIRE AGREEMENT.** This Agreement and the Dispute Resolution Program are the complete agreement on the subject of arbitration of disputes. This Agreement takes the place of any other verbal or written understanding on this subject. No party is relying on any

statements, oral or written, on the subject of arbitration or the effect, enforceability or meaning of this Agreement, except as specifically stated in this Agreement.

* * *

VOLUNTARY AGREEMENT. I acknowledge that I have carefully read this Agreement, I understand its terms, that all understandings and agreements between the Company and me relating to the subjects covered in this Agreement are contained in it, and that I have entered into the Agreement voluntarily and not in reliance on any other promises or representations by the Company other than those in the Agreement itself and the dispute Resolution Program.

I further acknowledge and agree that I have been given the opportunity to discuss this Agreement with my own private lawyer and have used that opportunity to the extent that I wish to do so.

The Agreement then carried signature lines for both the employee (or parent or guardian if the employee was a minor) and an "authorized officer" of Respondent.

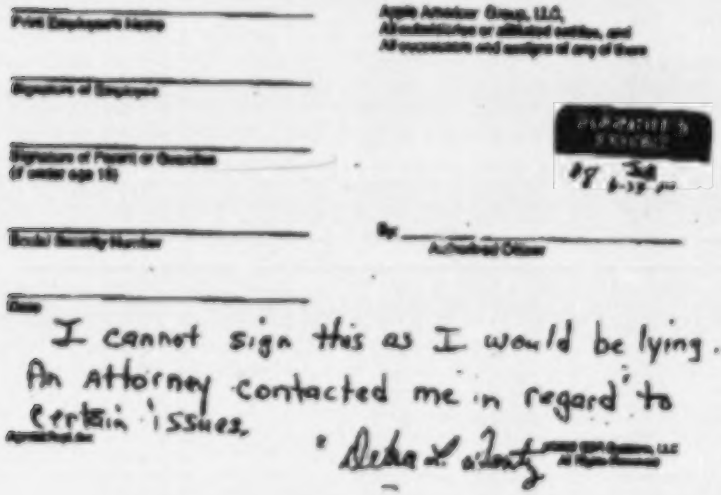
Petitioner did not sign the agreement, nor did she ever receive a full DRP booklet. Each and every other server at the restaurant had signed the agreement. Months later, during a restaurant audit, it was discovered that Petitioner had not signed. Afterward, the harassing

manager, as well as other lesser managers at the store, approached Petitioner numerous times with the last page of the agreement and ordered her to sign it. She refused, upon the advice of one of her regular customers who was an attorney. The managers continued to hound her, shoving the agreement at her, and she continued to refuse. On the bottom of the sheet, she finally wrote, "I cannot sign this as I would be lying. An attorney contacted me in regard to c rtain issues." She signed beneath the writing, and dated the document "7-2-02."[5]

Nonetheless, the store managers continued to press her. She again, on a second agreement, wrote at the bottom, "I cannot sign this as I have been contacted by an

---

[5] As noted *infra*, her refusal was admitted and set forth in the Respondent's corporate officer's affidavit submitted to the district court; however, Respondent omitted the authenticated document, a scanned excerpt of which is shown here and permissible under App. Rule 10(e)(2), as the document was referenced by Respondent's affidavit and purportedly attached to it.


I cannot sign this as I would be lying.
An Attorney contacted me in regard to
certain issues.

attorney(s) in regard to certain strong issues that have happened at Applebees, and sandly [sic] some continue." She again signed and dated the instrument beneath her written refusal. She turned over the agreement sheets to headquarters with a Post-It on the front, which read, "I was told to send this to you. As I told 3 managers + 2 keys when asked – if I signed this it would be a lie."

Petitioner never did sign the agreement and continued working at the Chapel Hill restaurant, where the harassment and retaliation of her had increased. She was never fired, disciplined, or told she was still subject to an arbitration agreement. Nor did Respondent or any of its agents ever suggest that she utilize the DRP. Rather, they merely continued to ignore her complaints of harassment and retaliation.

On December 9, 2002, she filed suit against Respondent and the manager individually in the Summit County, Ohio, Court of Common Pleas, alleging state claims of sexual harassment, retaliation, Ohio Minimum Fair Wage Act, as well as a claim under the Fair Labor Standards Act. Respondent removed the suit to federal court, representing that the federal court had jurisdiction.[6]

Respondent then answered the complaint, raising for the first time the affirmative defense that Petitioner was subject to an arbitration agreement and had

---

[6] In doing so, Respondent falsely assured the court that the manager had consented to removal, when in fact it had never contacted him. However, this was not learned by Petitioner until much later in the pendency of the remanded individual state claims against him.

"expressly" waived her right to sue in court. Respondent's attorney stated for the first time at the case management conference that it would be seeking a motion to stay and compel arbitration.

Over Petitioner's protests, the district judge stayed all discovery (including documents dealing with arbitration) and ordered the parties to brief the issue of arbitration and whether there was an agreement.

In its motion, Respondent argued that "Plaintiff manifested her assent to the arbitration agreement by electing to remain employed by the Company with knowledge that the arbitration agreement was a required term and condition of that employment." Respondent referred to the agreement as a "unilateral agreement" made effective by performance. It attached two exhibits and an affidavit: 1) the Strang memorandum purportedly from the corporate president announcing that soon an arbitration program would be adopted and it would be effectuated by "continued employment" (but that company officials later admitted was never distributed); 2) a copy of the DRP booklet – *minus the attached and/or perforated two-page arbitration agreement*; and 3) an affidavit by a corporate officer that confirmed her refusal and the text of what she wrote – but that falsely called the agreement "an acknowledgment form." The affidavit purported to attach Petitioner's "acknowledgment form" as an exhibit, but actually omitted it from the record.[7]

---

[7] Petitioner, who had never remembered getting the Strang memorandum, learned that Respondent's statement was false in a subsequent case in which discovery was ordered by a district judge. The second case was filed to preserve her Title VII claim, the right to sue letter having been issued after this case ("Dantz I") was on

Petitioner had never received an entire DRP, only the agreement portion. At the request of the undersigned she obtained a booklet, including the two-page agreement, which was put into evidence by Petitioner and upon which Petitioner based her arguments before the district court and the Sixth Circuit court. Thus, while the court did not have a copy of Petitioner's written refusal because Respondent inadvertently omitted it, it did have a record of the text of her refusal and a copy of the actual arbitration agreement – which obviously was not a mere acknowledgment form.[8]

The district court relied almost exclusively on the letter (which in fact was never sent to employees), finding

---

appeal. After filing the second case Petitioner moved for a stay of proceedings in the second case pending the appeal, but the judge denied stay, ordered that discovery on the arbitration issue be had, and ultimately found a genuine issue as to whether an agreement was formed. The issue was set for trial on March 14, 2005, pursuant to 9 U.S.C. § 4. Petitioner notified the Sixth Circuit of the situation and the pending trial at oral argument and also filed a motion to stay or vacate Dantz I in favor of the fuller record. The Sixth Circuit never ruled on the motion and affirmed Dantz I twelve days before the trial, resulting in the second judge vacating the trial order and ordering the case to arbitration.

The Respondent's material falsehoods to the first judge are fully laid out in the record of the second case, No. 5:04 CV 0060, Judge Adams. However, Judge Adams vacated the trial based on the Sixth Circuit's opinion – not because of res judicata, but because the opinion was so sweeping as to encompass the more developed record as well. In short, Petitioner's awareness of the DRP and her failure to quit her job were enough to find a forfeiture of her statutory rights, as made clear in the opinion.

[8] Moreover, Petitioner in her motion to stay the Sixth Circuit's decision provided a copy of the actual refusal as well as other documents showing deliberate misrepresentations by the Respondent, but the court did not acknowledge it.

that the letter was an "offer" and that Petitioner manifested her assent by continuing to work at the restaurant. The decision never discussed the actual agreement that was attached to the DRP booklets or the fact that the instrument clearly showed that arbitration was effective only by the parties' signing the instrument. Further, neither the trial court nor the Sixth Circuit discussed Respondent's behavior in trying to force Petitioner to sign the agreement; yet, clearly Respondent, as well as Petitioner, believed that the agreement was only effective if signed.

The district court erroneously found that there was a valid contract and dismissed the claims against Respondent; it remanded the individual claims against the manager to state court, forcing Petitioner to fight in two arenas. Petitioner timely appealed the court's decision to the Sixth Circuit Court of Appeals. As noted in footnote 7, in the interim Petitioner obtained evidence that the corporate president's letter, on which the district court had relied, was never distributed; she supplied that evidence to the Sixth Circuit and moved to stay or vacate the appeal. The Sixth Circuit never ruled on the motion and rendered its opinion days prior to the trial in the second case, effectively neutralizing the second suit and leaving her remediless.

As it turned out, the Sixth Circuit largely disregarded the letter and the court's opinion was even more draconian than that of the trial court. The opinion discussed some of the text of the two-page arbitration agreement and acknowledged that Petitioner had expressly refused to submit to it, but found that, nonetheless, because the DRP booklet itself said arbitration was a "mandatory condition of employment,"

then Petitioner became constructively bound to arbitrate her claims the moment she learned that the company had adopted a DRP. (App. p. 11a). She merely should have quit her job on the spot if she did not wish to be subjected to mandatory arbitration, said the court. (*Id.*). The Sixth Circuit Court affirmed the district court, completely disregarding Ohio law that was to the contrary with respect to agreement formation. This timely appeal followed.

REASONS FOR GRANTING THE PETITION

In the wake of this Court's decisions in *Gilmer v. Interstate/Lane Johnson Corp.*, 500 U.S. 20 (1991), *Wright v. Universal Marketing Services Corp.*, 525 U.S. 70, 80 (1998), and *Circuit City Stores v. Adams*, 532 U.S. 105 (2001), circuit and district courts have rendered a patchwork of decisions applying the FAA to discrimination actions and trying to harmonize this Court's jurisprudence with respect to the conflicting interests and matters of public policy. The issues involved include: 1) federal interests in the integrity of private arbitration agreements, including proper application of the so-called presumption favoring arbitration contracts; 2) the protection of one's existing and statutory right of access to our courts and the degree of autonomy the employee has in retaining such rights while still remaining employed or obtaining employment; and 3) the extent to which an employee's assent to the agreement may be assumed under the circumstances – i.e., the tension between sections 3 and 4 of the FAA.

The result, predictably, has been a wide divergence of opinions and lines of thought such that neither employees nor employers, let alone courts, know

how to predict and determine when an employee has agreed to forfeit her access the courts. *See, e.g.*, Library of Congress' CRS Report for Congress, "Labor and Mandatory Arbitration Agreements: Background and Discussion" (May 31, 2001) ("The uncertainty that remains after *Wright* will continue pending further case law development or action by Congress.").

Circuit courts, employees and employers desperately need guidance by this Court on how to interpret and apply sections 3 and 4 of the Federal Arbitration Act (FAA). In the 15 years since *Gilmer* and the six years since *Circuit City*, the use of private arbitration agreements by employers and other entities has increased tenfold.

Moreover, while the federal courts are instructed to apply state contract principles in the determination of whether an arbitration contract was formed under the FAA,[9] they must first decide the threshold question of whether there is even an issue as to formation. 9 U.S.C. § 3. They also must determine at what point, and how strongly, to apply the various presumptions favoring arbitration.

These factors are intertwined and will necessarily color a court's view in making this determination. Added to this is the largely unspoken but highly motivating secondary objective of enforcing agreements pursuant to the FAA: easing the congestion of federal courts' dockets.[10]

---

[9] *See, e.g., First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

[10] *See, e.g., Prymer v. Tractor Supply Co.*, 109 F.3d 354, 362

The result has been an increasing number of courts, such as the Sixth Circuit in this case, short-circuiting Section 4 of the FAA, citing an alleged "presumption of arbitrability" in determining whether a contract to arbitrate has even been formed, contrary to their Court's holding in *EEOC v. Waffle House, Inc.*, 534 U.S. at 293-294. Without this Court's intervention and clarification of mandatory arbitration under the FAA, there will be no consistency in the various court interpretations of the Act. Indeed, the present and confusing state of affairs only encourages increased litigation in the federal courts to determine if the circumstances warrant the formation of a contract, and how and when the divergent policies espoused by this Court and the FAA are to be applied.

Can an employee's "agreement" arise merely by her showing up for work one day, even if she clearly and unmistakably *refuses* to agree to a forfeiture of her right to our public court system? Given this refusal, can she still be subject to mandatory arbitration and can the simple act of working itself constitute a "knowing and voluntary" waiver of her statutory and constitutional rights under Section 3 of the FAA, even when the employee reasonably believes she has preserved her rights to a trial by jury?[11]

There is a split in the Circuits as to what is required for the threshold question of whether there is

---

(7th Cir. 1997).

[11] Ironically, the federal income taxes taken from Petitioner's meager earnings support in part our state and federal judicial systems, yet she has unwittingly been denied access to these fundamental rights.

even a dispute over formation of an agreement to arbitrate.[12] Indeed, there are two divergent positions in the Sixth Circuit, one (as in the instant case) holding that even a clear and unmistakable refusal to agree to arbitration is irrelevant. Yet, nine days later, the Sixth Circuit held that any such waiver or forfeiture must be "knowing and voluntary," and thus clearly manifested by evidence in the record. See *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370 (6th Cir. 2005).

In addition, the procedural tool of removal from a state court unnecessarily adds to docket congestion as parties remove cases filed in state courts of general jurisdiction to federal courts –only to argue that no court has jurisdiction over the claims. These removing parties also generally require the federal court (which is of "limited jurisdiction," unlike state courts) to apply state law principles in making this determination,[13] going full circle and unnecessarily wasting federal court time on

---

[12] See *Walker, supra*, and *Prudential Ins. Co. Of America v. Lai*, 42 F.3d 1299, 1304-1305 (9th Cir. 1994) (requiring a "knowing and voluntary waiver" of right to jury trial in private employment); *see, also, Sarbak v. Citigroup Global Markets., Inc.*, 354 F. Supp. 2d 531, 537 (D.N.J., 2004) ("there must be an unambiguous writing that clearly establishes that an employee intended to waive the right to sue."), citing New Jersey law; *Shaffer v. ACS Gov't Servs.*, 321 F. Supp. 2d 682, 688 (D. Md., 2004) (mere continued employment or implied/constructive conduct insufficient to waive such an important right as trial by jury).

For decisions refusing to invoke the "knowing and voluntary" or "clear and unmistakable" requirements in private employment settings, *see, e.g., Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 184 (3d Cir. 1998); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 834 (8th Cir. 1997); *Diaz v. Josephthal, Lyon & Ross Inc.*, Unrep. No. 97 Civ. 4802,1998 U.S. Dist. LEXIS 22204 (S.D.N.Y., 1998).

[13] Citing *First Options*, 514 U.S. at 944.

that which should turn on state law. Hence, this Petition for Writ also argues that, in the event that an agreement to arbitrate is found to exist, any party who chooses to utilize the "litigation act" of removal, necessarily accepts jurisdiction of the judicial forum and waives any right to arbitration.

A. Question presented: An at-will employee and her employer must reach a mutual agreement to arbitrate employment claims, manifested by a "clear and unmistakable waiver" standard.

There are fundamental concepts dealing with arbitration issues so well rooted in American jurisprudence as to be indomitable. The first is that arbitration under the FAA "is a matter of consent, not coercion." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 293-294 (2002), quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). While the FAA directs courts to place arbitration agreements on equal footing with other contracts, it "does not require parties to arbitrate when they have not agreed to do so." *Id.*

Another principle is "the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it. . . . The reason for this rule is to protect the party who did not choose the language from an unintended or unfair result." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995), citing Restatement (Second) of Contracts § 206, Comment a (1979).

Yet another, and seemingly competing, principle is that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, "whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Mastrobuono*, 514 U.S. at 62.

The lone guiding opinion on private agreements by this Court is *Gilmer*, in which the Court held that statutory claims in an individual employment context are subject to the FAA. However, *Gilmer* contains little more than the assertion that such claims are arbitrable, while acknowledging the inherently unequal bargaining power of an employer over its employee. *Id* 500 U.S. at 33 ("Mere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."). However, this admittedly unequal bargaining power is less likely to be present when the employer is dealing with an experienced and organized representative of employees, such as a union, or with a sophisticated employee, such as a stockbroker, unlike in most cases.

In the 1998 decision of *Wright*, this Court held that, because a union bargains independently of its individual members, then the waiver of the right to a jury trial in the collective bargaining context must be "clear and unmistakable." 525 U.S. at 80. This is presumably so the individual members can knowingly and voluntarily vote in favor of the union agreement. The question then becomes, why don't unsophisticated individual employees enjoy similar protections? There simply is no justification for providing fuller protections to unionized employees, who generally have a savvy bargaining agent and who also have a presumption of "just cause" termination,

unlike at-will employees. Indeed, it is compelling to protect at-will employees who are generally unrepresented, unsophisticated and whose only source of information about the arbitration agreement is from the employer itself.[14]

Thus, any waiver or forfeiture of guaranteed and default rights – completely separate from the employment relationship – should be clear and unmistakable, proving that such agreement was made knowingly and voluntarily. In other words, to enforce an arbitration "agreement," the employer must do more than show that the employee had "notice" of the employer's unilateral adoption of an arbitration policy, or claim that by reporting for work the employee necessarily assents to the employer's ultimatum of "Show your acceptance of your waiver of a judicial forum by doing nothing unusual."[15]

---

[14] *See., e.g., Shaffer v. ACS Gov't Servs.*, 321 F. Supp. 2d 682, 688 (D. Md., 2004) ("The decision to forfeit one's right to a judicial forum is significant and requires a more affirmative action that simply continued employment. The Court is not convinced that Plaintiff bound himself to an arbitration agreement – particularly, where he has not signed an explicit consent or acknowledgment form – simply because he did not quit his job by a certain date."); *Trumbull v. Century Marketing Corp*, 12 F.Supp.2d 683, 687 (N.D. Ohio. 1998) ("To conclude that there was waiver of such an important right, there must at least be evidence that the plaintiff intended such waiver."). *See, also, Pryner v. Tractor Supply Co.*, 109 F.3d 354, 362 (7th Cir. 1997) (""[B]y being forced into binding arbitration [employees] would be surrendering their right to trial by jury – a right that civil rights plaintiffs . . . fought hard for and finally obtained in the 1991 amendments to Title VII.").

[15] While it is now settled that the federal courts perceive the arbitral and judicial forums as being substantially equal, it is still unescapable that employers are rushing to impose private arbitration agreements on their employees and that third-party drafters of such

This is particularly true where the employee has never signed any agreement or manifested assent to arbitration. In the instant case, for example, Petitioner finds herself "bound" despite her express refusals in writing to forfeit her rights.

B. Question presented: Waivers of the right to trial by jury in the at-will employment setting must be "knowing and voluntary."

As indicated above, a natural corollary to requiring a "clear and unmistakable" waiver (evidentiary-wise) in a

---

agreements and DRPs are touting more limited damages and discovery, "fairer results" via a business setting, and the secretiveness and non-public nature of such proceedings. Indeed, the federal government has clearly spoken out against mandatory binding arbitration as a condition of employment. *See, e.g.*, The E.E.O.C.'s Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment, EEOC Notice No. 915.002, July 10, 1997 (supporting mandatory arbitration only where an employee clearly chooses it, and never to be imposed as a condition of employment); the NLRA's stated purpose in its formation to rectify "The inequality of bargaining power between employees . . . and employers." 29 U.S.C. § 151. Moreover, after this Court's decision in *Gilmer*, the SEC withdrew its requirement of stockbrokers submitting to mandatory arbitration. In 1991, the ADA Congressional Committee expressly declared that enactment of the ADA was intended to preserve the right to a jury trial, and that an employee's choice to arbitrate had to be strictly voluntary and not mandatory or a condition of employment. H.R. Rep. No. 485, 101st Cong., 2d Sess., pt 3 at 76-77 (1990). *See, also*, The report of the Commission on the Future of Worker-Management Relations, (Dec. 1994), at 32 (discouraging use of mandatory arbitration as a condition of employment). Even the National Academy of Arbitrators finds that it is an abuse of due process to force arbitration on employees as a condition of employment. National Academy of Arbitrators' Statement and Guidelines (adopted May 17, 1997), 103 Daily Lab. Rep. (BNA) E-1 (May 29, 1997).

non-union setting is the requirement that an employee's waiver must be "knowing and voluntary." In the private, at-will setting, it is far too easy for unsuspecting employees who are dependent on their jobs to be manipulated by crafty employers. In this case, as with many other cases that are now being decided by the federal courts, there was no knowing and voluntary waiver, nor was it clear and unmistakable. Rather, Petitioner reasonably believed that she was not subject to arbitration because she expressly refused to agree to it.

Although this Court has held that the right to a judicial forum is not a substantive right, the right – which is guaranteed by statute in discrimination claims – is at least "significantly important." See *Wright*, 525 U.S. at 80. This is necessarily true regardless of whether the judicial forum is invoked under a collective bargaining situation or an at-will employment situation. *Id.* Moreover, while the right to a judicial forum is important in any legal dispute, it takes on added significance in the context of invasive discrimination, harassment, and similar prohibitions guaranteed by federal statute.[16] Unlike most other civil laws, these statutes expressly promise the right to a jury trial – "a right that civil rights plaintiffs fought hard for and finally obtained in the 1991 amendments to Title VII." *Gibson v. Neighborhood Health Clinics*, 121 F.3d 1126, 1130 (7th Cir. 1997).

---

[16] The stated purpose of these statutes is to prevent and/or rectify the invidious discriminatory acts of one's employer against one's *person*, "invidious" meaning "invasive" and entirely unrelated to the employment situation or the employee other than his/her status or stereotypically perceived status as an individual – unlike more typical economic disputes arising in commercial settings. *See, e.g.*, 42 U.S.C. 2000-e, et seq.

In short, the proper and uniform application of a "knowing and voluntary" standard, manifested by a "clear and unmistakable" evidence of waiver standard would cure the confusion that courts, employers and employees currently face with questions of mandatory arbitration. It would also prevent decisions, such as in this case, that are entirely contrary to reason.

C. Question presented: If there is any question of contract formation under the FAA, then it must be resolved pursuant to a limited trial by jury, as dictated in § 4 of the FAA, applying principles of state law.

The FAA makes clear through a plain reading of the text that if there is any doubt or dispute as to the actual formation of the agreement, then a jury trial must be held on that issue. 9 U.S.C. § 4. In other words, it is Congress' intent to preclude a district court from invading the factfinding province of a jury. Moreover, as made clear by this Court in *First Options v. Kaplan*, 514 U.S. at 944, state law, and not federal law must be applied to determine if there was an actual agreement between the parties. This was not done in the instant case.

Ohio law dictates that there is a presumption *against* forced arbitration of claims if the employee or party has not signed an agreement. See *Council of Smaller Enters. v. Gates, McDonald & Co.*, 80 Ohio St. 3d 661, 667 (1998); *Benjamin v. Pipoly*, 155 Ohio App.3d 171 (10th Dist. 2003). This presumption is based on this Court's own ruling in *Kaplan*, 5414 U.S. at 944. *Id.*, 80 Ohio St.3d at 667. *First Options v. Kaplan.*

Ohio law also requires affirmative evidence of a meeting of the minds of the parties to a contract, and that parties will presume that the parties' intent resides in the language employed in the written contract. *Kelly v. Medical Life Ins. Co.*, 31 Ohio St.3d 130 (1987). Moreover, the mere fact that an employee is aware of an employer's "adoption" of an arbitration policy is insufficient to show assent to it. *Hardwick v. Sherwin Williams Co.*, 2003 Ohio 657.

Agreements to arbitrate in the employment setting are separate and distinct from actual employment agreements that more naturally flow from the employment relationship itself, such as when an employer shares confidential information with the employee in order for the employee to perform the job, thus requiring a covenant not to compete prior to sharing it as a condition of employment. *Hardwick* at 5, n. 1.

At least one federal court has likewise held that, where an arbitration agreement requires signatures of both parties to be effective, then an unsigned or unexecuted instrument is void and unenforceable. *Clary v. The Stanley Works*, 8 Wage & Hour Cas. 2d (BNA) 1649, 2003 U.S. Dist. Lexis 12747 (D. Kan. 2003).

In Petitioner's case, because there was a question as to the formation of an arbitration agreement, the district court was required by section 4 of the FAA to hold a jury trial on the issue of agreement formation. Nonetheless, it refused to do so, citing section 3 of the FAA and holding that there was "no dispute" that there was an agreement to arbitrate, despite evidence that Petitioner expressly refused to sign a written two-way agreement. This is contrary to this Court's own holdings

and to the text of the FAA itself, not to mention state law on the issue of contract formation. The decision and others like it will otherwise stand as erroneous precedent, adding to the confusion of the courts on these difficult issues, as well as unfairly depriving unsuspecting persons of their rights under the law.

D. Question presented: *Arguendo*, if an agreement to arbitrate is found, the voluntary invocation of a federal court's jurisdiction by removal constitutes a waiver of any right to an arbitral forum when a case is originally filed in a court of competent jurisdiction able to decide the issue of arbitrability.

In *Lapides v. Bd of Regents of the University System of Georgia*, 535 U.S. 613, 624 (2002), this Court held that "Removal is an exceptional form of litigation conduct that invokes federal jurisdiction." The Court acknowledged that removal is an entirely knowing and voluntary act of consent to the full jurisdiction of the federal court. In other words, the intent to remove and accept the jurisdiction of the new judicial forum constitutes an express waiver of affirmative defenses that a party is immune from suit in a judicial forum, whether by constitutional amendment or private agreement.

As noted in *Lapides* 535 U.S. at 621, it would be highly unfair to allow "one who has invoked federal jurisdiction subsequently to challenge that jurisdiction," citing Justice Kennedy's concurrence in *Wisconsin Dep't of Corr. v. Schacht*, 524 U.S. 381 (1998). While *Lapides* limited itself to state-law claims, the voluntary forum-shopping of the Respondent should likewise apply where

there is a mix of federal and state claims.

Moreover, the *Lapides* decision did not limit itself to sovereign immunity, though that was the context of the decision. But the reasoning is no different and no less applicable here. Indeed, given the solemn nature of the Eleventh Amendment in this Court's jurisprudence, and the "heightened scrutiny" afforded state protection, the waiver of simple private contracts by removal is even more compelling.

In addition, one of the primary reasons for the FAA in the first place is to offer an allegedly faster, more economical resolution of disputes. As discussed above, it also is used by federal courts to manage their dockets. It therefore is absurd for a defendant to knowingly and voluntarily remove a case from a state court of general jurisdiction, fully competent to determine the question of arbitrability – only to delay the case and burden the federal court with the argument that the court lacks subject-matter jurisdiction.

CONCLUSION

In the United States we proclaim pride in our work. We seek jobs over welfare, self-sufficiency and free will over defeat and slavery. For nearly a century, this Court's jurisprudence has safeguarded the rights of the working person. The Civil Rights Act underscores this by guaranteeing equal opportunity for all in their employment.

Yet, Respondent, like so many others, is capitalizing on misreadings of the FAA, and on federal courts' efforts to clear their dockets. Respondent is

baldly attempting to do an end-run around two of the most precious rights in this country: the right to access our courts of law (for which we pay taxes), and the right of choice and control over our own lives. American citizens should not unwillingly or unwittingly be coerced into forfeiting these rights under any circumstances, let alone to a non-person, non-citizen corporation whose lone goal is the bottom-line and who controls all of the terms and conditions of employment, as well as the futures of its employees and their families.

The sacred tenets of our American Dream clash directly with the private manipulation of many employers in forcing arbitration on their workers, which is now being done with some courts' assistance, including that of the Sixth Circuit. The FAA cannot be used as both sword and shield. Any law that results (however inadvertently) in defeating the inalienable, constitutional, and statutory rights of citizens must be either overturned or harmonized with the laws that it purports to swallow by federal preemption.

Moreover, a so-called "forfeiture" cannot be recognized where it is allegedly implied and *de facto* – not by mutual agreement but by indentured servitude. If the *Dantz* decision is permitted to stand, then even citizens who *expressly refuse* such agreements will improperly be bound by them.

For the foregoing reasons, Petitioner respectfully requests this Honorable Court to grant her petition for certiorari and hear this case on the merits, and also to find that a waiver of access to public courts must be both "knowing and voluntary," and manifested "clearly and unmistakably." Only then will arbitration agreements

properly be put in the same position as other contracts.

Finally, if a party chooses to utilize the litigation act of removal to a different forum, then the act of removal should constitute a waiver of any so-called agreements to arbitrate even if an agreement were somehow found to exist in a particular case. To hold otherwise will only perpetuate the congestion of federal dockets, particularly in light of the current uncertainty and cacophony of judicial opinions on binding mandatory arbitration.

Respectfully Submitted,

Dennis R. Thompson
Counsel of Record
Christy Bishop
Thompson & Bishop
2719 Manchester Road
Akron, Ohio 44319
(330) 753-6874
Attorneys for Petitioner

(Any footnotes trail end of each document)

NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION

No. 03-4128

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEBRA DANTZ,
Plaintiff-Appellant,

v.

AMERICAN APPLE GROUP, LLC,
Defendant-Appellee.

March 1, 2005, Filed

COUNSEL: For DEBRA DANTZ, Plaintiff – Appellant: Dennis R. Thompson, Christy B. Bishop, Thompson Law Offices, Akron, OH.

For APPLE AMERICAN GROUP, LLC, Defendant – Appellee: Todd F. Palmer, Scott M. Loomis, Calfee, Halter & Griswold, Cleveland, OH.

JUDGES: Before: MARTIN and BATCHELDER, Circuit Judges, and O'MEARA, District Judge. *

OPINION BY: John Corbett O'Meara

OPINION: JOHN CORBETT O'MEARA, District Judge. The plaintiff-appellant Debra Dantz is appealing

the district court's decision to dismiss her action because her claims against her employer were subject to a mandatory and binding arbitration agreement. Dantz makes the following claims: (1) defendant Apple American Group LLP ("Apple") waived its right to arbitrate by removing the case to federal court; (2) the agreement to arbitrate lacked mutual assent; (3) the agreement lacked consideration; (4) the agreement is unconscionable; and (5) the agreement violates Ohio public policy. For the reasons stated below, we affirm.

I. BACKGROUND

In July 2000 appellant Debra Dantz was hired as a server at the Applebee's restaurant in Akron, Ohio. The Akron restaurant, along with a number of Applebee's restaurants located around the country, is operated by Apple American Group, LLC. Dantz's supervisor was Michael Sanders, the restaurant manager and an Apple employee. Under Sanders' supervision, Dantz was allegedly denied certain minimum wage payments and made subject to a hostile work environment.

On October 1, 2001, Apple adopted a broad, mandatory dispute resolution process culminating in binding arbitration for employee claims against Apple, known as the "Apple American Group LLC Dispute Resolution Program" (the "Program"). The district court found that prior to that date, all Apple employees, including Dantz, "received copies of the Program and attended group training sessions relating to the Program." Dantz v. Apple Ohio LLC, 277 F. Supp. 2d 794, 796 (N.D. Ohio 2003). The record before us does not give us cause to find that the district court's

understanding of the underlying facts was clearly erroneous. n1 As such, we adopt the district court's understanding of the factual background.

In a letter to employees dated September 7, 2001, Apple President Don Strang III stated the following:

We have therefore adopted, effective October 1, 2001, the Dispute Resolution Program that is detailed in the attached program summary. You will also be receiving Program Booklets. . . . From and after October 1, 2001, the Dispute Resolution Program will be the mandatory and exclusive means for resolving all work-related disputes. Please read the attached summary carefully. Your manager will conduct a meeting to discuss the Dispute Resolution Program and distribute Program Booklets to you. Please listen carefully to the presentation of the Program and feel free to ask questions -- any questions.

Your agreement to the program provisions, including arbitration, will be expressed by your continuing employment with the Company from and after October 1, 2001, by accepting any promotions, increases, transfers, bonuses or other benefits of employment, and by the Company's mutual promise to follow the Program's provisions, including those governing mandatory, binding arbitration.

J.A. at 73. The "attached program summary" referenced by Strang's letter is not in the record before this court.

The Program booklet outlines a four-step process for employee dispute resolution, culminating in mandatory

binding arbitration. The following claims are subject to arbitration:

Claims and disputes subject to arbitration include all those legal claims you may now or in the future have against the Company (and its successors or assigns) or against its officers, directors, shareholders, employees or agents. . . . and all claims that the Company may now or in the future have against you, whether or not arising out of your employment or termination, except as expressly excluded under the "Claims Not Subject to Arbitration" section below.

The legal claims subject to arbitration include, but are not to be limited to:

- claims for wages or other compensation;
- claims for breach of any contract, covenant or warranty;
- tort claims (including, but not limited to, claims for physical, mental or psychological injury, without regard to whether such injury was sustained in the course and scope of employment);
- claims for wrongful termination;
- sexual harassment;
- discrimination (including, but not limited to, claims based on race, sex religion, national origin, age, medical condition or disability whether under federal, state or local law);
- claims for benefits or claims for damages or other remedies under any employee benefit program sponsored by the Company (after exhausting administrative remedies under the terms of such plans); and

- claims for a violation of any other non-criminal federal, state or other governmental law, statute, regulation or ordinance.

J.A. at 95-96.

Apple intended the Program to be mandatory and binding on all employees. On the first page, in bold capital letters, the Program booklet stated,

THIS PROGRAM IS A CONDITION OF YOUR EMPLOYMENT AND IS THE MANDATORY AND EXCLUSIVE MEANS BY WHICH THOSE PROBLEMS MAY BE RESOLVED, SO READ THE INFORMATION IN THIS PROGRAM BOOKLET CAREFULLY.

J.A. at 90. The booklet went on to note,

If either party pursues a legal claim covered by the Dispute Resolution Program in court by any means other than arbitration, the responding party shall be entitled to stay or dismissal of such action, the remand of such action to arbitration, and the recovery of all costs and attorney's fees and expenses related to such action.

J.A. at 98. In another provision, the booklet stated, "This program will prevent you from filing a lawsuit in Court for individual relief for a legal claim subject to arbitration." J.A. at 99.

The Program requires Apple to submit any claims it has against employees to binding arbitration. This

provision is irrevocable under the terms of the Program.

Apple also distributed a separate, two-page "Agreement and Receipt for Dispute Resolution Program" ("Agreement"). It is unclear from the record when the two-page Agreement was given to Dantz. n2

The Agreement stated, in part,

MUTUAL PROMISE TO RESOLVE CLAIMS BY BINDING ARBITRATION. In signing this Agreement, both the Company and I agree that all legal claims or disputes covered by the Agreement must be submitted to binding arbitration. . . . I understand and agree that by entering into this Agreement, I anticipate gaining the benefits of a speedy, impartial dispute resolution procedure. This procedure is explained in the Dispute Resolution Program Booklet, which I acknowledge I have received and read or have had an opportunity to read. . . .

SOLE AND ENTIRE AGREEMENT. This Agreement and the Dispute Resolution Program are the complete agreement of the parties on the subject of arbitration of disputes. This Agreement takes the place of any other verbal or written understanding on this subject. No party is relying on any statements, oral or written, on the subject of arbitration or the effect, enforceability or meaning of this Agreement, except as specifically stated in this Agreement.

VOLUNTARY AGREEMENT. I acknowledge that I have carefully read this agreement, I understand its terms, that all understandings and agreements between

the Company and me relating to the subjects covered in this Agreement are contained in it, and that I have entered into the Agreement voluntarily and not in reliance on any other promises or representations by the Company other than those in the Agreement itself and the Dispute Resolution Program.

J.A. at 100-101.

On July 2, 2002, Dantz wrote on the two-page Agreement, at the place provided for her signature, "I cannot sign this as I would be lying. An attorney contacted me in regard to certain legal issues." J.A. at 26. She then signed and dated the document. Id.

In January 2003 Dantz filed an eight-count complaint against Apple in Ohio state court, alleging violations of the federal Fair Labor Standards Act and the Ohio Minimum Fair Wage Standards Act. Dantz alleged unjust enrichment, sexual harassment, negligent retention, retaliation, promissory estoppel, breach of implied contract, and spoliation of evidence. Apple removed the case to the United States District Court for the Northern District of Ohio, filed an answer, and moved that the district court stay proceedings pending arbitration. The district court construed Apple's motion as a motion to compel arbitration and granted the motion on July 21, 2003. Rather than granting a stay, the district court dismissed Dantz's action. It remanded to state court two counts against Michael Sanders individually. Dantz subsequently filed this appeal.

II. ANALYSIS

A party may appeal "a final decision with respect to an arbitration" under the Federal Arbitration Act ("FAA"). 9 U.S.C. § 16. The appellate court reviews *de novo* the district court's decisions regarding the existence of a valid arbitration agreement and the arbitrability of a particular dispute. Floss v. Ryan's Family Steakhouses, Inc., 211 F.3d 306, 311 (6th Cir. 2000). The existence of an agreement to arbitrate is governed by state law. Id. at 314; First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944, 131 L. Ed. 2d 985, 115 S. Ct. 1920 (1995). Thus, Ohio contract law governs the enforceability of the alleged agreement to arbitrate in this case.

Dantz raises a number of challenges to the enforceability of the arbitration agreement. We will discuss these claims in turn.

A. Waiver by Removal to Federal Court

Relying on recent United States Supreme Court precedent regarding states' waiver of federal sovereign immunity, Dantz argues that Apple waived its right to arbitrate by removing the case to federal court. The Supreme Court held in Lapides v. Board of Regents of the Univ. Sys. of Georgia, 535 U.S. 613, 152 L. Ed. 2d 806, 122 S. Ct. 1640 (2002), that by voluntarily invoking the jurisdiction of the federal court through removal, the State of Georgia waived its federal sovereign immunity. In Lapides, Georgia attempted to remove a case from state court, where its sovereign immunity had been waived by state statute, to federal court, where Georgia claimed sovereign immunity still

existed. The Court, worried about "unfair tactical advantages," unanimously held that Georgia had waived its federal sovereign immunity. Id. at 621. The holding was limited "to the context of state-law claims, in respect to which the State has explicitly waived immunity from state-court proceedings." Id. at 617.

Under the FAA, a party can waive a right to arbitrate. American Locomotive Co. v. Gyro Process Co., 185 F.2d 316, 318 (6th Cir. 1950). Moreover, waiver can be implied by a defendant's actions in pursuing litigation. Id. at 317, 320 (holding that a party waived its arbitration right when it requested arbitration after it litigated "numerous motions and proceedings" and engaged in extensive discovery over a period of seven years). However, mere removal of a case to federal court, and nothing more, does not constitute waiver of a defendant's right to arbitration. See Williams v. Cigna Fin. Advisors, 56 F.3d 656 (5th Cir. 1995) (holding that a defendant did not waive its arbitration right when it removed an action to federal court, filed a compulsory counterclaim, and engaged in discovery after a motion to stay discovery was denied).

Dantz admits that Lapides "has been primarily applied to cases involving the Eleventh Amendment," and cites one case, Obermaier v. Kenneth Copeland Evangelistic Ass'n, Inc., 208 F. Supp. 2d 1288, 1290 (M.D. Fla. 2002), that briefly considered Lapides in a private law context. n3 In Obermaier, the district court distinguished Lapides but did not completely reject its use in a private law context. Regardless, Obermaier offers no support for Dantz's claim that Lapides should extend beyond the realm of sovereign immunity.

We refuse to extend Lapides beyond the sovereign immunity context. Even if Lapides did apply, the potentially unfair litigation tactics the Court was concerned with in Lapides are not present in this case. There is no evidence that an Ohio state court would have treated this case any differently than the federal court would have. n4

B. Mutual Assent

Dantz argues that she did not agree to be bound by the terms of the Program. Under Ohio law, "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Harmon v. Phillip Morris, Inc., 120 Ohio App. 3d 187, 697 N.E.2d 270, 271 (Ohio Ct. App. 1997) (quoting AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 89 L. Ed. 2d 648, 106 S. Ct. 1415 (1986)). Ohio law requires mutual assent to form a valid contract. Id. (quoting Restatement (Second) of Contracts § 17 (1981)). Mutual assent "ordinarily takes the form of an *offer* or proposal by one party followed by an *acceptance* by the other party or parties." Id. (quoting Restatement (Second) of Contracts § 22 (1981)).

The district court found that Apple made an offer for a unilateral contract, which Dantz accepted by performance. The Program booklet set out the terms of the arbitration agreement and made it an explicit condition of her employment. Strang's September 7 letter further set out the manner of acceptance -- continued employment after October 1, 2001. The district court held that "plaintiff, an at-will employee, manifested her assent in the very way that the Company requested, that is, by continuing her

employment after October 1, 2001." Dantz, 277 F. Supp. 2d at 801. On the facts in the record before us, we agree with the analysis of the district court. Mutual assent is manifested by Dantz's continued employment after having been told explicitly that the arbitration agreement was a condition of her employment. n5 Cf. Lake Land Employment Group of Akron, LLC v. Columber, 101 Ohio St. 3d 242, 2004 Ohio 786, 804 N.E.2d 27, 32 (Ohio 2004) (noting that "an employer or an employee in an at-will relationship may propose to change the terms of their employment relationship at any time. If, for instance, an employer notifies an employee that the employee's compensation will be reduced, the employee's remedy, if dissatisfied, is to quit.")

C. Consideration

Ohio law requires that consideration be present for a contract to be enforceable. Harmon, 697 N.E.2d at 271 (quoting Restatement (Second) of Contracts § 17 (1981)). Under Ohio law, "to constitute consideration, a performance or a return promise must be bargained for." Id. (quoting Restatement (Second) of Contracts § 71(1) (1981)). "A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise." Id. at 271-72 (quoting Restatement (Second) of Contracts § 71(2) (1981)). "The performance may consist of (a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification, or destruction of a legal relation." Id. at 272 (quoting Restatement (Second) of Contracts § 71(2) (1981)). "Consideration may consist of either a detriment to the promisee or a benefit to the promisor.

A benefit may consist of some right, interest or profit accruing to the promisor, while a detriment may consist of some forbearance, loss or responsibility given, suffered or undertaken by the promisee." Id. (quoting Brads v. First Baptist Church, 89 Ohio App. 3d 328, 624 N.E.2d 737, 743 (Ohio Ct. App. 1993)).

The Harmon court found consideration was not present in a binding arbitration agreement that required employees to arbitrate their claims against the employer but did not require the employer to arbitrate its claims against its employees. Id. In this case, however, Apple is bound to arbitrate its claims against employees. The district court noted,

Both the employee and the employer are required to take certain defined disputes to arbitration and be bound by the outcome. Further, although the Company retained the right to change many of its policies without any notice to its employees, it specifically prohibited itself from making any changes to the mandatory arbitration policy. The reciprocal agreement, coupled with the prohibition on making changes, was clearly a detriment to the Company which constituted valid and sufficient consideration to support the arbitration agreement.

Dantz, 277 F. Supp. 2d at 804.

We agree with the district court's reasoning. We note also that the Ohio Supreme Court has recently ruled that continued employment alone was sufficient consideration to support a noncompetition agreement between an employer and an employee. Lake Land Employment Group, 804 N.E.2d at 31-32. Accordingly,

Dantz's continued employment with Apple was sufficient consideration under Ohio law.

D. Unconscionability

Under Ohio law, a contract must be found both procedurally and substantively unconscionable before a court will deem it unenforceable. Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 666 (6th Cir. 2003). A recent *en banc* opinion of this court summarized the requirements for procedural unconscionability as follows:

In determining procedural unconscionability, Ohio courts look to factors bearing on the relative bargaining position of the contracting parties, including their age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, and whether alterations in the printed terms were possible. The crucial question is whether each party to the contract, considering his obvious education or lack of it, [had] a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print. . . ?

Id. (citations omitted).

In this case, the circumstances surrounding the contracting were not procedurally unconscionable. Apple certainly had a far superior bargaining position, and the terms were not negotiable. Regardless, the Program booklet clearly laid out the terms of the arbitration agreement; and Apple provided training sessions for employees to learn how the Program

operated. Indeed, Dantz's attempt to refuse to assent to the terms of the contract after she consulted with an attorney is conclusive evidence that she understood the terms of the agreement.

Given the lack of procedural unconscionability, we need not reach the issue of substantive unconscionability. See Morrison, 317 F.3d at 666-67.

E. Public Policy

Finally, Dantz argues that the Program violates Ohio public policy because it requires her to relinquish her statutory rights or quit her job. Dantz cites a number of cases holding that the waiver of rights under Ohio and federal law requires informed consent and consideration if the waiver is by contract. See Parente v. Day, 16 Ohio App. 2d 35, 241 N.E.2d 280 (Ohio Ct. App. 1968); Shipe v. Norfolk & W. Ry. Co., 51 Ohio App. 361, 20 Ohio Law Abs. 264, 1 N.E.2d 174 (Ohio 1935); Brophy v. Cincinnati, New Orleans & Texas Pac. Ry. Co., 855 F. Supp. 213 (S.D. Ohio 1994); Adams v. Philip Morris, Inc., 67 F.3d 580 (6th Cir. 1995). Dantz argues that her right to litigate in a judicial forum has been waived improperly, violating Ohio public policy. This essentially echoes her contract formation arguments, and does not add a new public policy reason to hold the Program unenforceable.

Dantz also cites Collins v. Rizkana, 73 Ohio St. 3d 65, 1995 Ohio 135, 652 N.E.2d 653 (Ohio 1995), which establishes the tort of wrongful discharge in Ohio. Collins offers no support for Dantz's assertion that an Ohio court would strike down this arbitration agreement as violative of public policy. In fact, Ohio has

a strong public policy in favor of agreements to arbitrate in general. Williams v. Aetna Fin. Co., 83 Ohio St. 3d 464, 1998 Ohio 294, 700 N.E.2d 859, 865 (Ohio 1998).

III. SUMMARY

Apple's removal to federal court did not waive its right to arbitrate. Dantz assented to a unilateral contract with her continued employment. Adequate consideration existed in the mutual and irrevocable promises to arbitrate claims. Finally, the circumstances surrounding the agreement to arbitrate were not procedurally unconscionable, and the agreement does not violate Ohio public policy. We AFFIRM the judgment of the district court.

Footnotes

* The Honorable John Corbett O'Meara, United States District Judge for the Eastern District of Michigan, sitting by designation.

n1 On appeal, Dantz claims that she did not receive a copy of the Program until June 2002. The district court's understanding of the facts apparently relied on the affidavit of Seta Tchobanian, which stated, "In the Fall of 2001, the Company adopted the Program, to be effective October 1, 2001. The Program was distributed to all of the Company's employees, including Plaintiff, and group training sessions relating to the Program were conducted, including one attended by Plaintiff." J.A. at 26. Dantz notes that the second sentence of that excerpt has no date restrictions, making it vague whether the distribution and training sessions actually

occurred in the fall of 2001. Dantz also claims that the Program booklet "that Apple submitted for the record -- and now states was distributed in September 2001' – actually says © 2002 Dispute Solutions, LLC.' (R.16 Apple's Ex. A, Apx. Pg. 64). It thus could not have been distributed in September 2001 with the Strang memorandum or even later in Fall 2001.'" Appellee's Reply Brief at 10.

However, Dantz's arguments are contradicted by her own filings before the district court. The Program booklet that Dantz herself submitted said "© 2001 Dispute Solutions, LLC." J.A. at 90. Moreover, in Dantz's Response to Defendant Apple American Group LLC's Motion to Stay Pending Arbitration, Dantz did not dispute that she received the program booklet prior to October 1, 2001. J.A. at 74-75. Indeed, Dantz stated, "In Fall 2001 Dantz's manager, Michael Sanders, placed before her a copy of Strang Corporation and Managed Companies Dispute Resolution Booklet' ('Booklet'). The Booklet, dated 2001, laid out the dispute resolution program and then at the end, contained an Agreement and Receipt for Dispute Resolution Program' ('Agreement')." J.A. at 75.

n2 Dantz's stance before the district court appeared to be that she received the two-page Agreement in Fall 2001, J.A. at 75-76, but her appellate brief claims she first received it in June 2002, attached to the Program booklet. Appellant's Brief at 5.

n3 In her reply brief, Dantz also cites another case that expanded Lapides outside the Eleventh Amendment, Kenny A. v. Perdue, 218 F.R.D. 277 (N.D.Ga. 2003). Kenny A., however, again dealt with issues of

federalism closely related to the Eleventh Amendment. In that case, a state removed an action to federal court and then attempted to claim that the Younger abstention doctrine required that the federal court abstain.

n4 Dantz claims that "the Ninth District Court of Appeals of Ohio, which originally had jurisdiction over this case, requires additional consideration for agreement formation, even where employment is at will, rather than mere continued employment." Appellant's Reply Brief at 1. However, sufficient additional consideration outside of her continued employment existed, consistent with Ohio law. See discussion of consideration, infra. Moreover, the federal court looks to Ohio state law to determine if the agreement is valid. Both the Ohio courts and federal courts should rule exactly the same on the issues of contract formation. The difference in applicable law based on the choice of forum that potentially existed in Lapides is not present here.

n5 Mutual assent for the agreement to arbitrate would exist even under Dantz's version of the facts in her appellate briefs. According to Dantz, she was given the Program booklet in June 2002. The Program booklet made binding mandatory arbitration a condition of her employment. The Program covered all claims she had at the time of agreement, as well as any claims she might have in the future. Dantz continued to work for Apple after June 2002 and did not file suit in federal court until months later. Her mutual assent was expressed by her continued employment.

CASE NO. 5:03 CV 0329, (Resolving Doc. No. 16)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION

Debra Dantz

v.

Apple American Group LLC, et al.

July 21, 2003, Decided
July 21, 2003, Filed

COUNSEL: For Debra Dantz, Plaintiff: Christy B. Bishop, LEAD ATTORNEY, Thompson Law Office, Dennis R. Thompson, LEAD ATTORNEY, Thompson Law Offices, Akron, OH.

For Apple American Group LLC, Defendant: Scott M. Loomis, Todd F. Palmer, LEAD ATTORNEYS, Calfee, Halter & Griswold, Cleveland, OH.

Michael Sanders, Defendant, Pro se, Akron, OH.

JUDGES: David D. Dowd, Jr., U.S. District Judge.

OPINION BY: David D. Dowd, Jr.

OPINION:

MEMORANDUM OPINION AND ORDER

Before the Court is the motion of defendant Apple American Group LLC ("the Company") n1 for an order staying the instant case pending arbitration of the claims set forth in the complaint filed on January 22, 2003 in the Summit County Court of Common Pleas and removed by defendant on February 21, 2003, on the strength of Count I, a claim made under the Federal Fair Labor Standards Act. Plaintiff Debra Dantz ("Dantz") filed a response to the motion (Doc. No. 20) and defendant filed a reply (Doc. No. 27).

For the reasons and to the extent set forth below, the motion (Doc. No. 16), construed with respect to the Company as a motion to compel arbitration, is granted. As discussed below, the Court will remand Counts IV and VI, to the extent they are claims against an individual, defendant Michael Sanders. Further, the Court will dismiss all counts to the extent they are claims against the Company.

I. BACKGROUND

The complaint filed by Dantz against the Company and Michael Sanders, a manager employed by the Company, alleges that Dantz was hired in July 2000 as a server at the Chapel Hill Applebee's Restaurant, a franchisee of the Company. Her supervisor was Sanders. The eight-count complaint alleges violations of the federal Fair Labor Standards Act and the Ohio Minimum Fair Wage Standards Act, as well as claims of unjust enrichment, sexual harassment, negligent retention, retaliation, promissory estoppel, breach of contract, and spoliation of evidence. The retaliation claim is brought only under Ohio Rev. Code § § 4112.02(I) and 4112.99. The sexual harassment claim is not linked to any particular statute.

Presumably, if it is not brought under the Ohio Revised Code, it is meant to be a common law claim of sexual harassment. What is perfectly clear from the complaint is that there are no Title VII claims here.

The Company asserts that the employment relationship between it and plaintiff is governed by an agreement known as the "Apple American Group LLC Dispute Resolution Program" (the "Program") which contains a broad, mandatory dispute resolution process culminating in binding arbitration. The Program was adopted by the Company with an effective date of October 1, 2001. Prior to that date, all Company employees, including the plaintiff, received copies of the Program and attended group training sessions relating to the Program.

On the first page, in bold capital letters, the Program booklet stated:

THIS PROGRAM IS A CONDITION OF YOUR EMPLOYMENT AND IS THE MANDATORY AND EXCLUSIVE MEANS BY WHICH THOSE PROBLEMS MAY BE RESOLVED, SO READ THE INFORMATION IN THIS PROGRAM BOOKLET CAREFULLY.

(Motion, Exh. A). The Program then outlines a 4-step process for employment dispute resolution including: Communication, Executive Review, Mediation, and Arbitration. When "legal" claims, as defined by the Program, n2 are involved, either party to the dispute may skip directly to the Mediation step.

The Program describes certain rules, including rules as to what claims are subject to arbitration: n3

Claims and disputes subject to arbitration include all those legal claims you may now or in the future have against the Company (and its successors or assigns) or against its officers, directors, shareholders, employees or agents, including claims related to any Company employee benefit program or against its fiduciaries or administrators (in their personal or official capacity), and all claims that the Company may now or in the future have against you, whether or not arising out of your employment or termination, except as expressly excluded under the "Claims Not Subject to Arbitration" section below.

The legal claims subject to arbitration include, but are not to be limited to:

- claims for wages or other compensation;
- claims for breach of any contract, covenant or warranty (expressed or implied);
- tort claims (including, but not limited to, claims for physical, mental or psychological injury, without regard to whether such injury was sustained in the course and scope of employment);
- claims for wrongful termination;
- sexual harassment;
- discrimination (including, but not limited to, claims based on race, sex, religion, national origin, age, medical condition or disability whether under federal, state or local law);
- claims for benefits or claims for damages or other remedies under any employee benefit program sponsored by the Company (after exhausting

administrative remedies under the terms of such plans); and

- claims for a violation of any other non-criminal federal, state or other governmental law, statute, regulation or ordinance.

(Motion, Exh. A, at 4, emphasis added). Further underscoring the mandatory nature of the Program is the following provision:

If either party pursues a legal claim covered by the Dispute Resolution Program in court by any means other than arbitration, the responding party shall be entitled to stay or dismissal of such action, the remand of such action to arbitration, and the recovery of all costs and attorney's fees and expenses related to such action.

(Motion, Exh. A, at 6). Further, although the Company reserved the right to alter parts of the Program, the arbitration provisions were at all times binding on the Company:

The Company retains the right to unilaterally change or delete any provisions of this Program except for those provisions governing mandatory binding arbitration.

(Motion, Exh. A. at 6, emphasis added). Finally, although the Program was mandatory, it did not create a contract of employment:

While this Program constitutes a binding promise between you and the Company to arbitrate all claims in dispute described in the Program Booklet, this Program is not and shall not be construed to create any

contract of employment, expressed or implied. Nor does this Program in any way alter the "at will" status of any employment. This Program will prevent you from filing a lawsuit in Court for individual relief for a legal claim subject to arbitration.

(Motion, Exh. A, at 7, bold text in original; italics added).

The Company asserts that this Program is enforceable under both the Federal Arbitration Act and the Ohio Arbitration Act. As a result, the Company's motion seeks an order staying all court proceedings and awarding it the costs, expenses and attorney's fees incurred in preparation of the instant motion.

II. DISCUSSION

A. Claims against Defendant Michael Sanders

A careful review of the complaint filed in state court reveals that only two of the eight counts could arguably be leveled against defendant Sanders in his individual capacity. To the extent he may be involved in the remaining six counts, it would be only as an agent of the Company, with no individual liability.

Dantz does allege that Sanders sexually harassed her (see, e.g., PP 25, 28, 32 and Count IV) and that he retaliated against her for complaining about his conduct (see, e.g., PP 17, 34 and Count VI).

Although the remainder of this Memorandum Opinion will discuss the question of whether Dantz's claims against the Company are subject to binding arbitration under an arbitration agreement which she and the

Company allegedly agreed to, the claims against Sanders are not implicated by that discussion for the simple reason that any arbitration agreement would have been made between Dantz and the Company, not between Dantz and Sanders.

Although under Title VII there would be no individual liability for sexual harassment and/or retaliation, see Wathen v. General Electric Co., 115 F.3d 400 (6th Cir. 1997), Dantz's claims are brought only under Ohio law. Therefore, this Court turns to Ohio law to determine whether Sanders can be held individually liable for any sexually harassing and/or retaliatory behavior of his own, that is, whether, notwithstanding any agreement with the Company to arbitrate disputes, Dantz is nonetheless permitted to sue Sanders.

In Genaro v. Central Transport, Inc., 84 Ohio St.3d 293, 1999 Ohio 352, 703 N.E.2d 782 (1999), the Ohio Supreme Court answered a question certified to it by the Northern District of Ohio, specifically:

May supervisors and managers be held personally liable for unlawful discriminatory acts committed by such persons in violation of R.C. Chapter 4112?

Id. at 296 (rephrasing the actual certified question). The Ohio court noted that this question of state law "presupposes employer liability." Id. The Court answered the certified question in the affirmative and held:

For purposes of R.C. Chapter 4112, a supervisor/manager may be held jointly and/or severally liable with his/her employer for discriminatory conduct of the supervisor/manager in violation of R.C. Chapter 4112.

Id., Syllabus.

Therefore, this Court now concludes that the claims set forth in Counts IV and VI against Sanders individually are not in any way subject to the arbitration agreement which allegedly exists between Dantz and the Company and which is discussed at length below. These claims, both of which are purely state law claims as pled, will be remanded to the state court from whence they came.

The Court also notes that, to date, Sanders is not represented by counsel. On March 31, 2003, in response to a handwritten letter from Sanders which was docketed as a motion for leave to file an answer, this Court stated:

The Court plans to conduct the Case Management Conference (CMC) required by the local rules and requests that Sanders appear personally for that conference once it is scheduled. [footnote omitted]. Until that time, the Court directs Sanders not to worry about hiring an attorney or filing an answer since, in the Court's preliminary view, it is highly questionable whether Sanders could be personally liable for any of the claims set forth in plaintiff's complaint. The Court will explore this issue at the CMC.

In the meantime, plaintiff's counsel is urged to consider dismissing Sanders as a defendant and should come to

the CMC prepared to indicate his views on that course of action; in the alternative, counsel should come to the CMC prepared to explain how any of the causes of action that are pled in the complaint would result in Sanders' individual liability.

(Doc. No. 9, emphases in original). At that time, the Court preliminarily expressed the view that Sanders could not be held individually liable for any of the claims advanced in the complaint. Of course, that is true under federal law. However, the Court has now discovered, having researched the issue, that this is not true under Ohio law and, in fact, as already noted above, Sanders can be held individually liable for sexual harassment and/or retaliation under Ohio law. Clearly, the Court's preliminary view was simply wrong.

Given that procedural history, this Court is of the view that, upon remand, it would be advisable for Sanders to obtain representation and to file his answer forthwith with respect to Counts IV and VI. It would be further advisable for Sanders to affirmatively (and immediately) seek leave from the state court for a specific amount of time within which to file his answer. In no event should Sanders, presently unrepresented, ignore this lawsuit.

The Court expressly directs the Clerk to issue this order to Sanders himself at the address on the docket. The Court further directs Sanders to take all necessary steps before the Court of Common Pleas of Summit County to assure that his answer will not be foreclosed due to any perceived delay on his part.

B. Claims against the Defendant Company

In this section, the Court will now address the Company's assertions that Dantz's claims against the Company cannot be litigated but must be arbitrated.

The Federal Arbitration Act ("FAA" or the "Act") provides:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. The Act clearly applies to any contract which contains a written arbitration provision and which evidences a transaction "involving" interstate commerce.

As noted by the district court for the Southern District of Ohio:

Congress enacted the FAA "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts."

Raasch v. NCR Corp., 254 F. Supp.2d 847, 853-54 (S.D. Ohio 2003) (quoting Gilmer v. Interstate/Johnson Lane

Corp., 500 U.S. 20, 24, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991)). n4

The Supreme Court has interpreted 9 U.S.C. § 2 quite broadly, reading "involving" as the functional equivalent of "affecting commerce" which normally "signals an intent to exercise Congress' commerce power to the full." Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 277, 130 L. Ed. 2d 753, 115 S. Ct. 834 (1995) (citing Bernhardt v. Polygraphic Co. of America, Inc., 350 U.S. 198, 100 L. Ed. 199, 76 S. Ct. 273 (1956)); see also Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983) (noting the "liberal federal policy favoring arbitration agreements"). The Court has also recognized the applicability of arbitration provisions in the employment context, except for a few narrow exceptions not applicable here, see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985) ("by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum"), and has held that, where a party has "made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." Id. "So long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." Id. at 637. See also Floss v. Ryan's Family Steak Houses, Inc., 211 F.3d 306, 313 (6th Cir. 2000) (it goes without saying that the arbitral

forum must "allow for the effective vindication" of a plaintiff's statutory claim).

The FAA also provides:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3 (emphasis added).

The determinative factor of whether an arbitration provision can be enforced to settle a dispute is the existence of a contract between the parties demonstrating that they intended for such to be the case. See Floss, 211 F.3d at 314. That determination is made with reference to state-law contract principles. Id. (citing Perry v. Thomas, 482 U.S. 483, 492 n. 9, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987)); Orcutt v. Kettering Radiologists, Inc. 199 F. Supp. 2d 746, 750-51.

Raasch, 254 F. Supp.2d at 854. Thus, this Court must examine whether the Program set forth by the Company constitutes a binding agreement with reference to Ohio contract law. If it is a binding contract, then 9 U.S.C. § 3 requires arbitration instead of this litigation.

The Company asserts in its motion that the Program is a valid, binding and enforceable agreement to arbitrate all of the disputes raised by plaintiff's complaint. Although the Program was placed into effect almost a year after plaintiff began her employment, it is an enforceable agreement, according to the Company, because there was an offer and acceptance (mutual assent) supported by consideration.

The Company asserts that it offered plaintiff, an at-will employee, continued employment subject to the terms of the Program. It gave her a copy of the Program, conducted a training session, and provided her with a cover memorandum inviting acceptance by way of continued employment. n5 Plaintiff, according to the Company, manifested her assent to the Program by continuing to work at Applebee's, notwithstanding her refusal to sign the acknowledgment form provided to her with the Program booklet.

Plaintiff argues, in turn, that, although she did receive a copy of the Program, she refused to sign it when repeatedly asked by the Company to do so. She asserts that she was not required to quit her job in order to retain her legal rights. She argues that "Apple was put on notice that [she] did not voluntarily agree to forfeit her statutory and common law rights, nor her constitutional right to a jury trial." In her view, by allowing her to continue with her employment in the face of her refusal to sign on to the Program, the Company waived any right to apply the Program to her. n6

Plaintiff's view has no merit. There is no requirement that an arbitration agreement be signed in order to be

valid and enforceable. Brumm v. McDonald & Company Securities, Inc., 78 Ohio App.3d 96, 603 N.E.2d 1141 (Ohio App. 4, 1992). What is required to validate the arbitration agreement and make it contractual is an offer and acceptance, supported by consideration. Here, plaintiff, an at-will employee, manifested her assent in the very way that the Company requested, that is, by continuing her employment after October 1, 2001.

Plaintiff's reliance on Robinson v. Ada S. McKinley County Services, Inc., 19 F.3d 359 (7th Cir. 1994), for the proposition that she had no "duty" to quit her job is misplaced. In Robinson, the court found that the employer's attempt to unilaterally modify an employment contract was ineffective because there was no additional consideration. Robinson began her employment in 1979 under a 1978 personnel policy manual that provided for "permanent employment status" after a six-month probation period and outlined procedures for termination. In 1986, long after Robinson completed her six-month probationary period, which meant she had already attained tenure, her employer published a new policy manual which purported to give it the right to modify or change policies at any time without notice and which contained a disclaimer that the manual could not be construed as an employment contract. When Robinson was summarily terminated in 1989, she filed a breach of contract complaint. The Robinson court determined that the second manual could not modify the first (which it found to be an employment contract), absent additional consideration. It stated:

A valid modification of the original employment contract between Robinson and McKinley did not occur simply because McKinley unilaterally issued the 1986 Manual containing a disclaimer. Acceptance and consideration cannot be inferred from Robinson's continued work. By continuing to work, Robinson was merely performing her duties under the original contract. According to McKinley's logic, the only way Robinson could preserve her rights under their original employment contract would be to quit working after McKinley unilaterally issued the disclaimer. That is ridiculous.

"There is nothing unlawful about offering a benefit to a promisee in exchange for a modification of the contract; the problematic modifications are those not supported by consideration." American Hosp. Supply v. Hospital Products Ltd., 780 F.2d 589, 599 (7th Cir.1986). If a valid modification of the employment contract between Robinson and McKinley occurred, then Robinson gave up her legal right to tenure, permanent employment status, and the protections of the 1978 Manual. To find consideration to support this purported modification, there must be some benefit to Robinson, detriment to McKinley, or Robinson's continued work under the 1986 Manual must have been a bargained for exchange. There was no consideration here. McKinley does not claim that Robinson received any benefit for giving up her protections, and McKinley did not suffer any detriment. Moreover, there was no bargained for exchange to support Robinson's relinquishment of the protections she was entitled to under the 1978 Manual. Therefore, we find that Robinson's continued work does not constitute consideration for the purported modification.

Robinson, 19 F.3d at 364 (emphasis added). Plaintiff relies on the first paragraph quoted above to make her argument; but plaintiff's situation is very different from Robinson's. Robinson already had an enforceable right to permanent employment by the time her employer attempted to unilaterally change her employment contract. See Curtis 1000, Inc. v. Suess, 24 F.3d 941, 947 (7th Cir. 1994) (noting with approval a refusal to regard continued employment as consideration in a case like Robinson where the employee's contract already entitled her to continued employment). Therefore, absent new consideration in the form of a benefit to Robinson or a detriment to her employer, the new "contract" was not enforceable. n7 Plaintiff here was an "at-will" employee. She did not have any contractual right to continued employment. Her situation is much closer to that of the plaintiffs in Adkins v. Labor Ready, Inc., 303 F.3d 496 (4th Cir. 2002) and Raasch v. NCR Corporation, 254 F. Supp.2d 847 (S.D.Ohio 2003).

In Adkins, a temporary employee of Labor Ready, an agency that provided manual day labor to companies, filed a lawsuit alleging violations of various labor laws. Labor Ready filed a motion to compel arbitration and to stay proceedings based on an agreement signed by Adkins and every Labor Ready employee. This policy provided:

I understand that my employment with LABOR READY, INC. is on a day-to-day basis. That is, at the end of the work day, I will be deemed to have quit unless and until I request and receive a work assignment at a later date.

I agree that any disputes arising out of my employment, including any claims of discrimination, harassment or wrongful termination that I believe I have against Labor Ready and all other employment related issues (excluding only claims arising under the National Labor Relations act [sic] or otherwise within the jurisdiction of the National Labor Relations Board) will be resolved by arbitration as my sole remedy. The arbitration shall be conducted by the American Arbitration Association under its Commercial Arbitration Rules and the decision of the arbitrator shall be final and binding. I understand that Labor Ready also agrees to arbitrate in the same manner any claims which the company believes it has against me.

I HAVE READ AND AGREE TO THE ABOVE STATEMENTS.

303 F.3d at 500 (upper case in original). Adkins argued that the above was unenforceable because there was no exchange of consideration to support the formation of a contract. The Fourth Circuit disagreed, concluding:

... By its terms, however, the arbitration clause requires both Adkins and Labor Ready to arbitrate any employment-related claims either might have. Because "no consideration [is required] above and beyond the agreement to be bound by the arbitration process" for any claims brought by the employee, Johnson v. Circuit City Stores, 148 F.3d 373, 378 (4th Cir.1998), Labor Ready's promise to arbitrate its own claims is a fortiori adequate consideration for this agreement.

Adkins argues that this promise was "illusory" but advances no convincing reasons to support this

assertion. His contention that Labor Ready has no reciprocal rights against its employees under worker protection provisions, while obviously true, does not by itself demonstrate that Labor Ready's promise to arbitrate its own claims is meaningless. At bottom, Adkins appears to contend that Labor Ready could possess no conceivable claims against its at-will employees, ignoring the fact that in every employment relationship, each side bears reciprocal obligations to the other. See, e.g., Am.Jur.2d Employment Relationship § 222 (2002) (employee liable to employer for any profit received as the result of a breach of employee's duty of loyalty). There was plainly adequate consideration here to support the formation of a contract.

303 F.3d at 501 (emphases added).

In Raasch v. NCR Corporation supra, the court upheld a mandatory arbitration policy imposed upon an at-will employee after he had already been employed for some time. The policy stated, as does the policy in the instant action, that continued employment, along with acceptance of any future pay raises, promotions, bonuses, and the like, would constitute acceptance of the policy. Although Raasch attacked the policy for failure to evince a mutuality of obligation, the court rejected that argument:

... Raasch contends that because the arbitration provision excepts from its coverage certain disputes, which it contends are typical of the kind which NCR itself would be most likely to initiate, it lacks mutuality, presumably because NCR retains the right to go to court for disputes it is more likely to initiate whereas

its employees do not retain that right for disputes they are more likely to initiate. Even if the disputes excepted from ACT would generally be of the type NCR itself would be more likely to initiate, it miscomprehends the mutuality of obligation doctrine to state that this poses a problem. Mutuality requires only that both Raasch and NCR be bound to the terms of any dispute that is required to be submitted to the arbitrator. For example, NCR cannot expect Raasch to be bound by the arbitrator's ruling on a question of age discrimination if it retains the right to reject the ruling in the event it is ultimately unfavorable to it, or if it retains the right to change the ground rules on how the arbitrator is permitted to reach its conclusion. Upon review, the Court finds no indication in ACT's provisions that NCR has withheld its own obligation to abide by any decision rendered by an arbitrator pursuant to a Stage 3 dispute. That is all that is required insofar as mutuality of obligation is concerned; nothing in that doctrine requires that just because both parties agree to arbitrate discrimination disputes and the like they also must agree to arbitrate every other type of dispute.

254 F. Supp.2d at 856-57 (footnotes omitted; emphases added). The court concluded that there was mutuality of obligation because "NCR, as with Raasch, must proceed through the non-judicial stages with respect to any dispute subject to [the arbitration agreement]." Id. at 857.

Here, as in both Adkins and Raasch, both the employee and the employer are required to take certain defined disputes to arbitration and be bound by the outcome. Further, although the Company retained the right to

change many of its policies without any notice to its employees, it specifically prohibited itself from making any changes to the mandatory arbitration policy. This reciprocal agreement, coupled with the prohibition on making changes, was clearly a detriment to the Company which constituted valid and sufficient consideration to support the arbitration agreement. As in both Adkins and Raasch, the Company here sought assent to the arbitration agreement by way of plaintiff's continued employment, an assent which plaintiff gave. n8

Therefore, this Court concludes, as a matter of law, that the Program was a binding agreement which requires that plaintiff resolve her claims against the Company through arbitration.

Plaintiff's final argument – that a jury must determine whether the Program constitutes a binding agreement to arbitrate – is without merit. The FAA provides that the Court need only be "satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement[.]" 9 U.S.C. § 3. That test has been met in the instant case.

The final issue which this Court must address is the Company's request to recover its costs, attorney's fees and expenses in the instant action under the following provision in the Program:

5. If either party pursues a legal claim covered by the Dispute Resolution Program in court by any means other than arbitration, the responding party shall be entitled to stay or dismissal of such action, the remand of such action to arbitration, and the recovery of all

costs and attorney's fees and expenses related to such action.

(Motion, Exh. A, at 6). This paragraph is contained in the Program as the fifth numbered paragraph in a section captioned "Arbitration Fees and Costs." The other four paragraphs deal with the following: (1) that the party seeking arbitration must pay $ 120 to the arbitration agency; (2) that either party may engage a court reporter at the party's own expense; (3) that each party will be responsible for its own attorney's fees, if any, except that the arbitrator may award reasonable fees to a party prevailing on a statutory claim that allows such party to recover attorney's fees; and (4) that the arbitrator may assess attorney's fees against a party whose claim is frivolous, unreasonable or factually groundless.

This Court has now concluded that the Program is an enforceable contract requiring arbitration. That is the end of the road for these proceedings. Resolution of the employment dispute, including the award of any attorney's fees available under the above-cited section of the Program, is a matter for the arbitrator.

Finally, the Company in the instant case has not moved to compel arbitration, but has only sought a stay pending arbitration. n9 This Court has now determined that the dispute is arbitrable under the Program. Although the Company did not specifically move to compel arbitration, this Court concludes that it is implicit in the Company's request for a stay pending arbitration, that the Company is clearly seeking an order compelling arbitration. At present, there is no pending arbitration. Therefore, if neither party initiates

arbitration proceedings, this action will remain stayed indefinitely. That is clearly unacceptable.

Since the Program provides that the arbitrator's decision is "final [and] binding" (Motion, Exh. A, at 4), the Court concludes that it is appropriate to construe the Company's motion as one to compel arbitration, to grant such motion, and to dismiss this action. See Arnold v. Arnold Corp., 920 F.2d 1269 (6th Cir. 1990); Orcutt v. Kettering Radiologists, Inc., 199 F. Supp.2d 746 (S.D.Ohio 2002) (holding that dismissal rather than a stay is appropriate where an arbitrator's decision would be final and binding, once the court determines that the dispute is indeed arbitrable).

Finally, the Court feels compelled, in view of the order of dismissal to address one final matter. The Company has not suggested in any of its pleadings that plaintiff is "in default in proceeding with ... arbitration[,]" 9 U.S.C. § 3, although admittedly the Company made a boilerplate mention of untimeliness in its fourteenth affirmative defense. (See, Doc. No. 5). The Court notes that there is a notice provision in the Program which requires a party seeking arbitration to give notice "within one year or within the applicable statute of limitations, whichever is longer." Absent such notice, "the claims shall be void and deemed waived." Presumably, counsel for the Company, as an officer of the Court, would have told the Court if, in the Company's view, granting this motion would completely preclude plaintiff's pursuit of her claims. Since there has been no such suggestion, the Court is assuming that the Company is not hiding a "gotcha" in its back pocket, that is, the Court assumes that the Company did not make this motion with the full

intention, if it were granted, to only then raise the argument that arbitration has been waived due to untimely notice. The Court trusts that the Company has taken seriously the following statements in the Dispute Resolution Program, which this Court has found binding:

> The Company is committed to building a strong relationship between the Company and all of our employees -- a relationship that is based on trust and open communications ...
>
> We understand, however, that problems and disagreements are unavoidable when people with different viewpoints spend a lot of time together. We cannot entirely eliminate disagreements, but we can provide a process for resolving them when they do occur by taking prompt, constructive action.

(Motion, Exh. A, at 1). This Court explicitly finds that plaintiff's bringing of this action appears to have been in good faith, based on a legitimate (although erroneous) interpretation of the applicability of the Program, in view of her belief that she had not assented to the Program. Therefore, in the Court's view, so long as this action was timely brought within the relevant statutes of limitation, any deadlines under the Program would have been tolled during the pendency of these proceedings. Further, since the Company has strenuously argued that it has not waived its right to have these disputes arbitrated by its removal of the action to this Court, the Court assumes that the Company actually believes that these disputes are still arbitrable within the provisions of the Program.

III. CONCLUSION

For the reasons set forth above, the Company's motion for a stay of judicial proceedings pending arbitration, construed as a motion to compel arbitration, is granted. Further, since any decision by the arbitrator will, under the Program, be final and binding upon both Dantz and the Company, the Court DISMISSES this action, rather than granting a stay, leaving the question of attorney's fees to the arbitrator to resolve under the terms of the Program.

Further, the Court REMANDS only Count IV and VI and only with respect to defendant Michael Sanders, who is now strongly encouraged to obtain counsel and admonished to promptly file in the Court of Common Pleas of Summit County, Ohio a motion for leave to file his answer to plaintiff's complaint.

Finally, the Clerk is directed to serve a copy of this Memorandum Opinion and Order upon Michael Sanders at the address on the docket and, for record purposes, to file a certificate of such service.

IT IS SO ORDERED.

Date 7/21/2003

s/David D. Dowd, Jr.

U.S. District Judge

Footnotes

n1 The Company states in its motion that it was incorrectly identified in the complaint as "Apple Ohio LLC."

n2 "Legal claims" are defined as "statutory or common law" claims. (Motion, Exh. A, at 2).

n3 It also lists claims that are not subject to arbitration, mostly including matters relating to criminal proceedings, unemployment insurance, statutory workers' compensation, and actions to enforce restrictive covenants. (See Motion, Exh. A, at 4).

n4 The Raasch court explained that

while arbitration awards were enforceable, see, e.g., Brennan v. Brennan, 164 Ohio St. 29, 128 N.E.2d 89, 94 (1955) (noting that binding arbitration awards were held enforceable in Ohio, except where obtained by fraud or the like, at least as far back as 1835), American courts in general demonstrated hostility toward ordering specific performance of an agreement to arbitrate, seemingly adopting a jealous notion held by the common law courts of England that arbitration agreements were nothing less than a drain on their own authority to settle disputes. See Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219-220 n. 6, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985).

Raasch, 254 F. Supp.2d at 853.

n5 When the Program was first promulgated it was accompanied by a letter from the Company president dated September 7, 2001. This letter notified employees

that the Company had adopted the Program, effective October 1, 2001, and that "[each employee's] agreement to the program provisions, including arbitration, will be expressed by your continuing your employment with the Company from and after October 1, 2001, by accepting any promotions, increases, transfers, bonuses or other benefits of employment, and by the Company's mutual promise to follow the Program's provisions, including those governing mandatory, binding arbitration." (Motion, Exh. B) (emphases added).

n6 Plaintiff also argues that the Company waived any right to arbitration by its voluntary acceptance of this Court's jurisdiction through removal. Clearly this is not so; the Company was merely both responding to plaintiff's complaint and exercising its right to federal court jurisdiction. The Court notes that the Company immediately raised the mandatory Program as an affirmative defense.

n7 Plaintiff's reliance on the unpublished decision in Hardwick v. Sherwin Williams, Co., 2003 Ohio 657; 2002 Ohio App. LEXIS 7273, 2002 WL 31992364 (Ohio App. 2002), is also unavailing. In Hardwick, the facts were completely different from the instant case. There, the new agreement imposed upon the employees required them to submit to arbitration, but did not require the employer to do the same. Here, of course, both employees and employer are bound by the mandatory arbitration provisions. In Hardwick, there was no demand to show assent by continued employment nor was there even any attempt to make assent a condition of employment. Here, the Program clearly stated that it was "mandatory and exclusive" and "a condition of your employment." The cover letter accompanying the

Program when promulgated expresaly stated that "agreement to the program provisions, including arbitration, will be expressed by your continuing your employment with the Company from and after October 1, 2001 ...."

n8 The Court notes that the employees were informed of this new Program at least as early as September 7, 2001, even though the Program was not to take effect until October 1, 2001. Therefore, there was sufficient notice to employees who might have chosen not to continue their employment, even though, since they were at-will employees, the Company had no duty to give notice. Plaintiff certainly cannot argue that she was somehow forced into acceptance.

n9 Presumably this is because a ruling on a motion to compel arbitration is usually immediately appealable whereas a ruling on a motion to stay pending arbitration is not. In the former instance, the court would dismiss the action and relinquish jurisdiction; in the latter, jurisdiction is usually retained. See Floss v. Ryan's Family Steak Houses, Inc., 211 F.3d 306, 311 (6th Cir. 2000) (citing 9 U.S.C. § 16(b); Arnold v. Arnold Corp., 920 F.2d 1269, 1275 (6th Cir. 1990)).

CASE NO. 5:03 CV 0329, (Resolving Doc. No. 16)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION

Debra Dantz

v.

Apple American Group LLC, et al.

JUDGMENT ENTRY

For the reasons set forth in the Memorandum Opinion and Order filed contemporaneously with this Judgment Entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED:

(1) that Counts IV and VI, to the extent they seek to hold defendant Michael Sanders individually liable under Ohio law, are REMANDED to the Court of Common Pleas of Summit County, Ohio;

(2) that the defendant's motion for a stay of judicial proceedings pending arbitration, construed with respect to defendant Apple Ohio LLC as a motion to compel arbitration, is GRANTED; and,

(3) that, since any decision by the arbitrator will be final and binding on both the plaintiff and the defendant employer, the Court DISMISSES this action, rather than granting a stay, leaving the question of attorney's fees to the arbitrator to resolve under the terms of the arbitration agreement.

Case closed.

Date 7/21/2003

S/David D. Dowd, Jr.
U.S. District Judge

STATUTORY PROVISIONS INVOLVED

9 U.S.C. § 3 states:

Stay of proceedings where issue therein referable to arbitration: If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 4 provides:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28 [28 USCS §§ 1 et seq.], in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that

such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure [USCS Rules of Civil Procedure]. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure

[USCS Rules of Civil Procedure], or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

28 U.S.C. § 1441(a), (b) and (c) provide:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter [28 USCS §§ 1441 et seq.], the citizenship of defendants sued under fictitious names shall be disregarded.(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of

the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title [28 USCS § 1331] is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

29 U.S.C. 206(b) states:

Additional applicability to employees pursuant to subsequent amendatory provisions. Every employer shall pay to each of his employees (other than an employee to whom subsection (a)(5) applies) who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this section by the amendments made to this Act by the Fair Labor Standards Amendments of 1966 [29 USCS §§ 203, 206, 207, 213, 214, 216, 218, 255], title IX of the Education Amendments of 1972, or the Fair Labor

Standards Amendments of 1974, wages at the following rate: Effective after December 31, 1977, not less than the minimum wage rate in effect under subsection (a)(1).

O.R.C. 4112.02 (A) states:

It shall be an unlawful discriminatory practice: (A) For any employer, because of the race, color, religion, sex, national origin, disability, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

O.R.C. 4112.02(I) states:

It shall be an unlawful discriminatory practice: (I) For any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code.

O.R.C. 4112.99 states:

Civil remedies for violation: Whoever violates this chapter is subject to a civil action for damages, injunctive relief, or any other appropriate relief.

OCT 14 2005
OFFICE OF THE CLERK

No. 05-216

IN THE

Supreme Court of the United States

DEBRA DANTZ,

Petitioner,

v.

AMERICAN APPLE GROUP, LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

TODD F. PALMER*
W. ERIC BAISDEN
LAURA K. KENDALL
CALFEE, HALTER & GRISWOLD LLP
1400 McDonald Investment Center
800 Superior Avenue
Cleveland, Ohio 44114-2688
(216) 622-8200

* *Counsel of Record*

Attorneys for Respondent

197242

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Respondent, Apple American Group LLC, has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
Statement Pursuant to Rule 29.6	i
Table of Contents	ii
Table of Cited Authorities	iv
Introduction	1
Statement of the Facts	1
Reasons for Denying the Petition	5
I. The Petition Does Not Present a Conflict in the Law.	6
A. The First and Fourth of Petitioner's Questions Presented for Review State Legal Propositions Which Have Not Been Adopted by Any Known Court in This Country.	6
1. "Clear and Unmistakable" Evidence of Waiver	6
2. Waiver of Arbitration by Removal to Federal Court	8
B. The Second and Third Questions Presented for Review State Settled Legal Propositions Which Were Properly Applied Below, and Merely Are an Attempt to Revisit the Facts of the Case.	10

Contents

Page

1. "Knowing and Voluntary" Waiver 10

2. Right to Jury Trial under FAA Upon Finding of Question as to Formation 14

II. The Petition Misstates the Record Below, and Raises No Basis For Review of the District Court's Proper Application of the Law. 20

Conclusion 26

TABLE OF AUTHORITIES

Page

Cases:

Ahing v. Lehman Bros., 94Civ.9027(CSH), 2000 U.S. Dist. LEXIS 5175 (S.D.N.Y. Apr. 20, 2000) 6

Armijo v. Prudential Ins. Co. of Am., 72 F.3d 793 (10th Cir. 1995) 16

Benjamin v. Pipoly, 800 N.E.2d 50 (Ohio Ct. App. 2003) 19

Brumm v. McDonald & Company Securities, Inc., 603 N.E.2d 1141 (Ohio Ct. App. 1992) 4, 19

Cirillo v. Arco Chemical Co., 862 F.2d 448 (3d Cir. 1988) 14

Council of Smaller Enterprises v. Gates, McDonald & Co., 687 N.E.2d 1352 (Ohio 1998) 19

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) 17 n.9

Fisser v. Internatl. Bank, 282 F.2d 231 (2d Cir. 1960) 19

Germany v. River Terminal Railway Co., 477 F.2d 546 (6th Cir. 1973) 10

Gibson v. Neighborhood Health Clinics, 121 F.3d 1126 (7th Cir. 1997) 11 n.6

Cited Authorities

Page

H&M Charters, Inc. v. Reed, 757 F. Supp. 859 (S.D. Ohio 1991) 10

Hardwick v. Sherwin Williams Co., No.81575, 2002 Ohio App. LEXIS 7273 (Ct. App. Feb. 13, 2002) 18

Hooters of Am. v. Phillips, 39 F. Supp. 2d 582 (D.S.C. 1998) 14

Johnson v. Long John Silver's Rests., Inc., 320 F. Supp. 2d 656 (M.D. Tenn. 2004) 13

Jones v. Fujitsu Network Communs., Inc., 81 F. Supp. 2d 688 (N.D. Tex. 1999) 6, 12

Joseph Muller Corp. Zurich v. Commonwealth Petrochemicals, Inc., 334 F. Supp. 1013 (S.D.N.Y. 1971) 17

Lapides v. Bd. Of Regents of the University System of Georgia, 535 U.S. 613 (2002) 9

Maier v. Pacific Heritage Homes, Inc., 72 F. Supp. 2d 1184 (D. Or. 1999) 14

Mantaline Corp. v. PPG Industries, Inc., No.97-4473, 2000 U.S. App. LEXIS 14036 (6th Cir. June 8, 2000) 10

Cited Authorities

Page

Maryland Casualty Co. v. Jones, 279 U.S. 792 (1929) 21, 25

Med. Dev. Corp. v. Indus. Molding Corp., 479 F.2d 345 (10th Cir. 1973) 19

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 8 n.5, 14

Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) 8 n.5

Paladino v. Avnet Computer Techs., 134 F.3d 1054 (11th Cir. 1998) 16

Pellerin Constr., Inc. v. Witco Corp., Civ.Act.No.00-0465Sec.R(4), 2001 U.S. Dist. LEXIS 2934 (E.D. La. Mar. 13, 2001) 11

Raasch v. NCR Corp., 254 F. Supp. 2d 847 (S.D. Ohio 2003) 12

RDO Fin. Servs. Co. v. Powell, 191 F. Supp. 2d 811 (N.D. Tex. 2002) 11

Robinson v. Ada S. McKinley County Services, Inc., 19 F.3d 359 (7th Cir. 1994) 18

Ross v. Bridgewater Constr., Inc., Ct.App.No.L-03-1029, 2003 Ohio App. LEXIS 5552 (Ct. App. Nov. 21, 2003) 19

Cited Authorities

Page

Systran Financial Services v. Giant Cement Holding, Inc., 252 F. Supp. 2d 500 (N.D. Ohio 2003) 10

Tonry v. Security Experts, Inc., 20 F.3d 967 (9th Cir. 1994) 21, 25

Walker v. Ryan's Family Steak Houses, Inc., 289 F. Supp. 2d 916 (M.D. Tenn. 2003) 12

Winters v. Pacific Gas & Elec. Co., No.98-17136, 2000 U.S. App. LEXIS 5935 (9th Cir. Mar. 20, 2000) 21, 25

Wright v. Universal Marketing Services Corp., 525 U.S. 70 (1998) 6, 11 n.6

Statutes:

9 U.S.C. § 4 ..... 14, 15

29 U.S.C. § 207 3

29 U.S.C. § 255 3

ORC § 4111.01 *et seq.* 3

INTRODUCTION

This case arises out of the attempt of Petitioner Debra Dantz ("Petitioner") to avoid arbitration of her employment-related disputes with Respondent Apple American Group, LLC ("the Company"). Although she states four "Questions Presented for Review" in her Petition for Writ of Certiorari ("the Petition"),[1] she fails to raise a single question of disputed law, much less a split between the circuits or indeed, between any two courts. Furthermore, despite her attempt to add to and distort the record below, she is unable to show that the relevant law was anything but properly applied by the lower courts, and thus completely fails to provide any basis for this Court to grant her Petition and review this case.

STATEMENT OF THE FACTS

The Company operates a number of Applebee's Neighborhood Grill & Bar restaurants in locations across the country. Petitioner was employed as a server in the Company's Chapel Hill location in Akron, Ohio. In the Fall of 2001, the Company adopted a Dispute Resolution Program ("the DRP"), to be effective October 1, 2001. A booklet containing the terms of the DRP, entered into the record below as Exhibit A to the Company's Motion to Stay Court Proceedings Pending Arbitration ("the Motion to Stay"), was distributed to all of the Company's employees, including Petitioner, and group training sessions relating to the DRP were conducted, including one attended by Petitioner. The DRP booklet clearly "describes the steps that both [employees] and the Company *must* take to resolve many types of workplace problems. The Company is also obligated to follow [the DRP], and will also be bound by arbitration." (Motion to Stay, Ex. A at 1) (emphasis added).

1. Cites to the Petition will be noted as "(Pet. ___)".

Further, in bold typeface and all capital letters, the DRP expressly informs employees that:

> **THIS PROGRAM IS A CONDITION OF YOUR EMPLOYMENT AND IS THE MANDATORY AND EXCLUSIVE MEANS BY WHICH THOSE PROBLEMS MAY BE RESOLVED, SO READ THE INFORMATION IN THIS PROGRAM BOOKLET CAREFULLY.**

Id.

Thus, Petitioner certainly was aware both of the terms of the DRP and its mandatory nature. In fact, Petitioner effectively acknowledged her receipt of the DRP by recording her repeated "refusal to sign" an acknowledgment form that accompanied the DRP booklet. A copy of one such "refusal" was included by reference in the record below, and is reproduced in the Petition.[2] In addition, in a memorandum dated September 7, 2001, which came to be known as "the Strang Memorandum" after the Company representative who signed it, the Company advised Petitioner and its other employees as follows:

> *Your agreement to the program provisions, including arbitration, will be expressed by your continuing employment with the Company from and after October 1, 2001*, by accepting any promotions,

2. This form was referenced in the record below as Exhibit A to the Affidavit of Seta Tchobanian, Director of Human Resources for the Company. The form was inadvertently omitted when the Affidavit was entered into the record. However, as Petitioner correctly observes in her Petition, the Company acknowledged and described the form explicitly in Affidavit, and has no objection to her characterization of the form as a record document in the District Court case below. *See* Pet. 8, n.5.

> increases, transfers, bonuses or other benefits of employment, and by the Company's mutual promise to follow the Program's provisions, including those governing mandatory, binding arbitration.

The Strang Memorandum, entered into the record below as Exhibit B to the Motion to Stay, was distributed to the Company's employees prior to the group training sessions it conducted on the DRP. (Affidavit of Seta Tchobanian). Following the Company's institution of the DRP, Petitioner manifested her willingness to be bound by the DRP by remaining in employment after October 1, 2001, and accepting the benefits, terms and conditions of that employment. As such, the DRP became binding between Petitioner and the Company.

Despite the existence of the DRP and her obligation to follow its terms in the pursuance of her disputes with the Company, Petitioner initiated the instant action by filing in the Court of Common Pleas, Summit County, Ohio a Complaint alleging violation of the federal Fair Labor Standards Act, 29 U.S.C. §§ 207, 255, and the Ohio Minimum Fair Wage Standards Act, Ohio Revised Code § 4111.01 *et seq.*, unjust enrichment, sexual harassment, negligent retention, retaliation, promissory estoppel, breach of implied contract, and spoliation of evidence. The Company timely removed the action to the District Court for the Northern District of Ohio and filed its Answer, denying the substantive allegations in the Complaint and interposing affirmative defenses relating to Petitioner's obligation to arbitrate her claims. The Company then filed its Motion to Stay.

In his opinion, attached to the Petition at 1a,[3] District Court Judge Dowd properly found that Petitioner received a copy of the DRP Booklet, the acknowledgment form, and the Strang Memorandum, attended training on the DRP, and then continued her employment after October 1, 2001. (D.C. 3, 11, 17). In doing so, Judge Dowd pointed out that, under Ohio law, "there is no requirement that an arbitration agreement be signed in order to be valid and enforceable," (citing *Brumm v. McDonald & Company Securities, Inc.*, 603 N.E.2d 1141 (Ohio Ct. App. 1992)), and found that Petitioner, "an at-will employee, manifested her assent in the very way that the Company requested, that is, by continuing her employment after October 1, 2001." (D.C. 12). After correcting Petitioner's misguided reliance on cases involving either employees who were not employed at-will, or involving arbitration agreements which did not expressly condition continued employment on acceptance of the agreement's terms, Judge Dowd concluded that, "*as a matter of law*, [the DRP] was a binding agreement which requires that [Petitioner] resolve her claims against the Company through arbitration." (D.C. 17) (emphasis added). The District Court then construed the Company's Motion to Stay as a motion to compel arbitration and granted that latter motion, dismissing Petitioner's action because, under the terms of the DRP, the arbitrator's decision would be "final and binding" on the parties. (D.C. 19).

Petitioner then appealed Judge Dowd's decision to the Court of Appeals for the Sixth Circuit. As Petitioner correctly states in her Petition, the Sixth Circuit affirmed the ruling of

---

3. Cites to the District Court Opinion will be noted as "(D.C. ____)", and cites to the Sixth Circuit Court of Appeals decision will be noted as "(C.A.____)".

Judge Dowd, effectively holding that "Petitioner's awareness of the DRP and her failure to quit her job [after October 1, 2001] were enough" to find that she had assented to the terms of the DRP and that she was bound to arbitrate her disputes with the Company. (Pet. 11, n.7). She then filed the present Petition with this Court, seeking review from the decisions below.

REASONS FOR DENYING THE PETITION

In each of her purported Questions Presented for Review, Petitioner fails to show how the decision below conflicts on a matter of federal law with any decision in the federal circuit courts, with any decision of the Supreme Court of Ohio, or, for that matter, with the decisions of any other court in this country. In fact, her "Questions" are not really questions at all; two of them state propositions of law which have not been adopted by any known American court, while the other two conversely state settled propositions of law which are not the subject of dispute between any known jurisdictions, and which were properly applied to the facts of this case in the proceedings below.

Thus unable to raise a legal challenge to the decision below, Petitioner turns to an attack on the factual findings in the record. She contends that, based on her refusal to sign the DRP, she did not assent to its terms, and thus did not waive her right to a trial by jury. This argument failed as a matter of law below, but Petitioner nevertheless resorts to a desperate attempt to add to the "facts" she presented in the record below and re-argue her case here. Unfortunately for Petitioner, not even these added "facts", which are not a part of the record properly before this Court, can provide her with a basis for her Petition; the courts below properly applied the applicable law to find that she assented to and is bound by the DRP.

I. The Petition Does Not Present a Conflict in the Law.

A. The First and Fourth of Petitioner's Questions Presented for Review State Legal Propositions Which Have Not Been Adopted by Any Known Court in This Country.

1. "Clear and Unmistakable" Evidence of Waiver

In her first Question Presented for Review, Petitioner asserts that an at-will employee's intent to waive his or her right to a jury trial by entering into an arbitration agreement "must" be established to the heightened "clear and unmistakable" standard of evidence. As support for this sweeping mandate, Petitioner cites . . . nothing. She was unable to provide any precedent for her position because this Court specified in *Wright v. Universal Marketing Services Corp.*, 525 U.S. 70 (1998), that, for at-will employees like the Petitioner, the waiver of jury trial rights does *not* require a heightened evidentiary showing to the "clear and unmistakable" standard. *Wright*, 525 U.S. at 80-81 (finding that in cases that "involved an individual's waiver of his own rights, rather than a union's waiver of the rights of represented employees . . . the 'clear and unmistakable' standard was not applicable"). *See also Ahing v. Lehman Bros.*, 94Civ.9027(CSH), 2000 U.S. Dist. LEXIS 5175 at *14-16 (S.D.N.Y. Apr. 20, 2000) (noting that non-at-will employees subject to "union-negotiated collective bargaining agreements" containing arbitration agreements "were specifically distinguished from [at-will employees subject to] individually executed arbitration agreements . . . and hence the 'clear and unmistakable' standard was not applicable" to the latter); *Jones v. Fujitsu Network Communs., Inc.*, 81 F. Supp. 2d 688, 691 (N.D. Tex. 1999) (noting Plaintiff's "misplaced" reliance on the "clear and unmistakable" waiver standard in the context of at-will employment).

In fact, citing[4] *Wright*, Petitioner acknowledges that this Court only applies the "clear and unmistakable" standard to waiver of the jury trial right by *unionized* employees, based on the fact that these employees do not individually bargain for and assent to the dispute resolution mechanisms to which they become bound, but rather rely on a bargaining representative (the union) to do so on their behalf. The rationale for requiring a heightened showing of proof of intent to waive the right to a jury trial in the collective bargaining context simply does not apply to at-will employees such as Petitioner, who had the option to review the terms of the DRP before she accepted it, and who manifested her acceptance and entered into the DRP separately through her choice to continue employment with the Company after October 1, 2001. Petitioner herself reveals that said rationale does not apply to her by observing that the "clear and unmistakable" standard is particularly necessary "where the employee has never signed any agreement *or manifested assent to arbitration*." (Pet. 20) (emphasis added). If this statement is true, then so is its corollary; where the employee has manifested assent to arbitration (including by a method other than signing an agreement, such as continued employment after a specified date), a heightened standard of proof of waiver is not necessary. As Petitioner admits that neither this Court nor any other has adopted her position or

---

4. The remainder of the cases to which Petitioner cites in support of her position on this Question Presented for Review state general propositions of contract law or non-binding statements of state contract law which are not, in any case, at odds with the unanimously held position that waiver by an at-will employee need not be proven to a heightened evidentiary standard. Indeed, aside from *Wright*, which she admits is distinguishable because it involved unionized and not at-will employees, none of the other cases cited by Petitioner even mention the "clear and unmistakable" standard.

the rationale behind it[5], this Question is not appropriate for review by this Court.

2. Waiver of Arbitration by Removal to Federal Court

In her fourth Question Presented for Review, Petitioner asserts that an employer loses its right to enforce a valid arbitration agreement when it removes a case brought by an employee in state court to federal court, even when the employer asserts immediately upon removal the affirmative defense that the employee is required to arbitrate the dispute. Both the District Court and the Sixth Circuit quickly and properly disposed of this argument, with the Sixth Circuit

5. Petitioner claims that the "competing" principles involved in arbitration agreements have caused confusion in the lower courts, and that this confusion has been exacerbated by this Court's supposedly "lone guiding opinion on private agreements" in *Gilmer*. (Pet. 18). Yet, she cites to no cases from any lower courts exhibiting any such confusion. Indeed, this Court has made its policy clear regarding the favorability of private agreements to arbitrate in the employment context, and how such agreements are to be treated under the FAA, and has done so in a myriad of cases besides *Gilmer*. See, for example, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)):

> [Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or like defense to arbitrability.

noting Petitioner's complete lack of relevant precedent to support her position, and the District Court explaining that "[c]learly, this is not so; the Company was merely both responding to plaintiff's complaint and exercising its right to federal court jurisdiction." (D.C. 12).

Instead of pointing to a split between the circuits on federal law, Petitioner cites to a lone case from this Court, *Lapides v. Bd. Of Regents of the University System of Georgia*, 535 U.S. 613, 624 (2002), as putative support for her contention that the Company waived its right to enforce arbitration by removing Petitioner's improvidently filed case to federal court. *Lapides* involved the attempt of the State of Georgia to remove a case from the state court forum, in which its sovereign immunity would be waived by state statute, to federal court, in which its immunity would remain intact, and this Court explicitly based its decision to find waiver by removal on the "unfair tactical advantage" of forum shopping that removal would provide to the sovereign.

As the Sixth Circuit pointed out when Petitioner raised this argument below, *Lapides* has not been applied outside the sovereign immunity context by *any* court, and furthermore, "[e]ven if *Lapides* did apply, the potentially unfair litigation tactics the Court was concerned about in *Lapides* are not present in this case. There is no evidence that an Ohio state court would have treated this case any differently than the federal court would have." (C.A. 8). Petitioner admits in her Petition and in the record below that principles of state law would apply to any contract formation issues. *See, infra*, Question Presented for Review No. 3; *see also* Petitioner's Response to the Motion to Stay 11-12. Furthermore, should the federal court find that no agreement to arbitrate exists and subsequently hear the underlying

dispute on its merits, the federal court would apply state law on any substantive state law claims, so forum-shopping would result in no benefit to the shopper.

Thus, the accepted rule is that removal does not constitute waiver of arbitration in the employment context. *Systran Financial Services v. Giant Cement Holding, Inc.*, 252 F. Supp. 2d 500, 507 (N.D. Ohio 2003) (quoting *Mantaline Corp. v. PPG Industries, Inc.*, No. 97-4473, 2000 U.S. App. LEXIS 14036 at *14-15 (6th Cir. June 8, 2000)) ("[A] party's attempt to defend its right to arbitrate cannot be used to show waiver"). *See also H&M Charters, Inc. v. Reed*, 757 F. Supp. 859, 865 (S.D. Ohio 1991) (quoting *Germany v. River Terminal Railway Co.*, 477 F.2d 546, 547 (6th Cir. 1973)) ("[W]aiver may not be inferred from the fact that a party does not rely exclusively on the arbitration provisions of the contract, but attempts to meet all issues raised in litigation between it and another party to the agreement."). As Petitioner can muster absolutely no authority to support her position, much less demonstrate a split in the law in need of resolution, this Question need not be reviewed by this Court.

B. The Second and Third Questions Presented for Review State Settled Legal Propositions Which Were Properly Applied Below, and Merely Are an Attempt to Revisit the Facts of the Case.

1. "Knowing and Voluntary" Waiver

Neither this Court nor the Company dispute that a waiver of jury trial rights must be knowing and voluntary. *See, e.g., Johnson v. Long John Silver's Rests., Inc.*, 320 F. Supp. 2d 656, 670 (M.D. Tenn. 2004) (surveying Sixth

Circuit law applying the knowing and voluntary waiver standard to agreements to arbitrate); *RDO Fin. Servs. Co.*, 191 F. Supp. 2d 811, 813 (N.D. Tex. 2002) ("The federal standard for determining the validity of a contractual waiver of the right to a jury trial is . . . whether the waiver was made in a knowing, voluntary, and intelligent manner."); *Pellerin Constr., Inc. v. Witco Corp.*, Civ.Act.No.00-0465Sec.R(4), 2001 U.S. Dist. LEXIS 2934 at * 1 (E.D. La. Mar. 13, 2001) ("A party may waive its right to a jury trial only if it does so voluntarily and knowingly.") (internal citations omitted). In so stating this general principle of contract law, Petitioner's second Question Presented for Review does nothing to advance her case before this Court that her Petition should be granted; although she refers to "confusion that the courts, employers and employees currently face" with respect to her second Question (Pet. 22), she fails to cite a single case discussing the application — or the non-application — of the "knowing and voluntary" standard.[6] Instead, she resorts to making the unsupported and vague statement that "[i]n this case, as with many other cases that are now being decided by the federal courts, there was no knowing and voluntary waiver . . . Rather, Petitioner reasonably believed that she was not subject to arbitration." (Pet. 21). Unable to raise

6. In fact, Petitioner cites to only two cases in her entire discussion of this Question. One is *Wright v. Universal Marketing Services Corp.*, 525 U.S. 70, 80 (1998), which she cites for the proposition that the right to a judicial forum is "significantly important." The other is *Gibson v. Neighborhood Health Clinics*, 121 F.3d 1126, 1130 (7th Cir. 1997), which she cites in her discussion of the right to a jury trial provided by the 1991 amendments to Title VII. Notably, Title VII is not even involved in this case. In any event, neither of these citations relate to the "knowing and voluntary" standard that she purports to be the source of "confusion" in the courts giving rise to the need for clarification by this Court through granting of her Petition.

even the specter of unsettled law on this point, Petitioner thus attempts to challenge the application of the settled law to the facts of record below.

Even if a review of the application of this correct statement of law to the facts below were a proper exercise for this Court, the record is clear that the law was correctly applied. The District Court found that Petitioner received a copy of the DRP and the Strang Memorandum, and attended an informational training session on the DRP, all of which specifically notified her that the DRP was a condition of her at-will employment and that her employment after October 1, 2001 would constitute an acceptance of the DRP. Thus, she knowingly waived her right to a jury trial on claims covered by the DRP when she voluntarily chose to remain employed with the Company after October 1, 2001. *See, e.g., Raasch v. NCR Corp.*, 254 F. Supp. 2d 847, 867 (S.D. Ohio 2003) ("As long as an employer gives an at-will employee proper notice of a new policy, and can show that the employee understood the new policy, the Court is hard pressed to conceive of how the policy, as long as it is not itself illegal, will not be enforceable as a term of the employee's employment."); *Jones v. Fujitsu Network Communs., Inc.*, 81 F. Supp. 2d 688, 692 (N.D. Tex. 1999) ("By continuing to work for Defendant after he received notice of the Arbitration Policy, Plaintiff accepted the arbitration policy as a matter of law.").

Petitioner's reliance on her refusal to sign any DRP documents as somehow affecting the validity of her waiver is misplaced. The knowing and voluntary manifestation of a waiver is determined by an objective standard. *Walker v. Ryan's Family Steak Houses, Inc.*, 289 F. Supp. 2d 916, 934 (M.D. Tenn. 2003) (observing that courts follow "an objective

test to determine mutual assent" to arbitration agreements and that it is often "necessary to look beyond the words of the parties to their intent in considering mutual assent."). *See, also Johnson v. Long John Silver's Rests., Inc.*, 320 F. Supp. 2d 656, 664 (M.D. Tenn. 2004) ("Under the most basic principles of contract law . . . a contractual relationship can arise when circumstances, acts, and conduct of parties support a reasonable inference of mutual understanding and agreement. The agreement arises from the parties' intentions, presumed from their non-explicit language or conduct.") (internal citations omitted). Thus, Petitioner's acceptance of the DRP in the precise manner specified by the Company — her continued employment after October 1, 2001 — manifested her knowing and voluntary waiver.

Petitioner's subjective belief that, by continuing to work but refusing to sign the form acknowledging her receipt of the DRP materials, she would somehow remain outside the ambit of the DRP, is simply irrelevant. This subjective belief, even if sincerely held, was not, as Petitioner contends, "reasonabl[e]" under the circumstances, given that she had been given information directly to the contrary in the Strang Memorandum and through the DRP informational session she attended.[7] In any event, a subjective belief that her waiver was ineffective would be legally insufficient to override either the DRP's plain language or the objective manifestation of

7. Although Petitioner claims in her Petition that "clearly" she "believed that the agreement was only effective if signed" (Pet. 12), she conceded in her Response to the Motion to Stay that the Company "announced that the program was mandatory on anyone who continued working there." (Petitioner's Response 2). In light of her own admission, then, she cannot now claim to have "reasonably believed" that the Company would not enforce the agreement against her absent her signature on it.

her knowing and voluntary waiver. *See, e.g., Maier v. Pacific Heritage Homes, Inc.*, 72 F. Supp. 2d 1184, 1192 (D. Or. 1999) (holding that, despite the plaintiff-employee's statement in his affidavit that "I have never intended to release my claims against defendants and do not believe I have ever done so", the employee "cannot rely on his subjective beliefs to contradict the agreement's plain language or to create an ambiguity that does not exist") (internal cites omitted); *Hooters of Am. v. Phillips*, 39 F. Supp. 2d 582, 604-605 (D.S.C. 1998) (finding that plaintiff-employee's "subjective belief" as to the consequences of not signing an arbitration agreement with her employer, "even if it is believed," was legally insufficient); *Cirillo v. Arco Chemical Co.*, 862 F.2d 448, 449 (3d Cir. 1988) (finding that plaintiff's "misguided subjective belief" that he was not waiving his right to bring a claim against his employer was "insufficient"). Petitioner's second Question Presented for Review accordingly provides no grounds for this Court to grant her Petition.

2. Right to Jury Trial under FAA Upon Finding of Question as to Formation

In her third Question Presented for Review, Petitioner again states a seemingly undisputed proposition of law, then attempts to lure this Court into a review of the application of this law to the facts below. Again, this Court should decline Petitioner's invitation to engage in this futile exercise, as there is no conflict in the law as to the Question she presents, and the law was correctly applied below.

Citing to Section 4 of the FAA, 9 U.S.C. § 4, Petitioner states that a jury trial applying principles of state law is required under the FAA "[i]f there is any question of contract formation". (Pet. 22). This statement, presumably an attempt

to paraphrase Section 4, is *almost* accurate. The relevant portion of Section 4 of the FAA states:

> *The court* shall hear the parties, and *upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue*, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. . . . If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. . . . Where such an issue is raised, the party alleged to be in default may . . . demand a jury trial of such issue.

9 U.S.C. § 4 (emphasis added). As the italicized statutory language makes clear, Petitioner's statement that a jury trial "must" be held is only true where the court is first "satisfied" that the making of the agreement is "in issue". Thus, there must be more than just "*any* question of contract formation", or as she later states, "*any doubt or dispute* as to the actual formation of the agreement" (Pet. 22); instead, the making of the agreement must be in issue.

It is the well-settled law of this Court, and indeed, not the subject of any conflict among the circuit courts, that the statutory language of Section 4 of the FAA requires that before the issue is referred to a jury, the court must first determine whether it is "satisfied" that the formation of the contract is "in issue", a threshold question of law, not fact. 9 U.S.C. § 4; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626 (1985) ("[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute. The court is to make this determination.") (citations

omitted). *See also Armijo v. Prudential Ins. Co. of Am.*, 72 F.3d 793, 797 (10th Cir. 1995) ("Although the parties' intent controls regarding whether they agreed to arbitrate a particular dispute, determining their intent is a question of law for the court to decide."); *Paladino v. Avnet Computer Techs.*, 134 F.3d 1054, 1057, 1059 (11th Cir. 1998) (recognizing district court's power to compel arbitration if satisfied that there is no issue regarding contract formation and that "in any contract case, the parties' intent is controlling with regard to whether they agreed to arbitrate a particular dispute, and determining intent is a question of law for the court").

The District Court below, after examining the record and discussing the applicable legal precedent cited by both parties, expressly held that "[t]he test had been met in the instant case" and that it was "satisfied" that the agreement to arbitrate had been validly formed "as a matter of law" and that the dispute therefore was referable to arbitration. (D.C. 17). The record is clear that the law was properly applied in the proceedings below.

Petitioner was unable to cite to *any* legal authority to support her apparent position that she was entitled under the FAA to a jury trial based on her simple act of disputing the formation of the agreement to arbitrate,[8] rather than by providing legally sufficient evidence and authority to support such a declaration and "satisfy" the District Court that the formation of the

---

8. Interestingly enough, Petitioner claimed below in her Response to the Motion to Stay that "there is not an issue with respect to the formation of an agreement to arbitrate." (Petitioner's Response 12). She now appears to base her third Question Presented for Review on the exact opposite contention: that there *was* an issue with respect to formation, that she raised this issue (despite her statement to the contrary), and that she was thus entitled to a jury trial.

arbitration agreement was "in issue". This is because the settled law holds precisely to the contrary; as the court in *Joseph Muller Corp. Zurich v. Commonwealth Petrochemicals, Inc.*, 334 F. Supp. 1013, 1018-1019 (S.D.N.Y. 1971) observed,

> [T]he Act has provided that the court must be 'satisfied that the making of the agreement for arbitration * * * is not in issue'; otherwise there must be a trial on that issue. That test, however, cannot mean that a trial is necessary in every case where the court finds preliminarily that such an issue has been tendered. If, upon the papers submitted and after a hearing thereon, there emerges only a question of law on which the court is 'fully informed,' relief may be granted without a trial. After all, such an issue would never go to a jury in any case.

Id. at 1018-1019 (internal citations omitted). As she provides no authority supporting her polar opposite view, she has presented no basis for this Court to grant her Petition based on a conflict in the law.[9] Rather, she again resorts to the argument that the District Court improperly applied the law in finding that there was no legal issue as to the formation of her agreement to arbitrate with the Company. As before, the record refutes her contention.

---

9. Likewise, any contention that the underlying law applied by the court in the determination as to whether formation of the agreement is "in issue" was in conflict and in need of resolution by this Court is unavailing, as the law to be applied by the court in these situations is state contract law, and thus will always, by necessity and by design, vary from case to case. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

It is important to note that Petitioner significantly misrepresents both the record and the applicable state law on this point. Her dissembling of the record in this case is discussed in further detail below, but merits specific mention here as well. Petitioner starts her description of the District Court's application of the FAA by noting that "state law [in this case the law of Ohio], and not federal law must be applied to determine if there was an actual agreement between the parties. This was not done in the instant case." (Pet. 22). While she is correct that Ohio law applies, her statement that it was not applied by the court below is patently false. District Court Judge Dowd specifically defined his inquiry as whether the DRP "constitute[d] a binding agreement with reference to Ohio contract law" (D.C. 11), and proceeded to cite Ohio law throughout his analysis. In fact, in her Response to the Motion to Stay, it was *Petitioner* who cited to law from outside the State of Ohio to support her claim that she had not assented to the agreement; the District Court properly corrected her mistaken reliance on this non-binding precedent as irrelevant in any case because it did not involve at-will employees.[10]

---

10. *See* the District Court's discussion of Petitioner's "misplaced" reliance on *Robinson v. Ada S. McKinley County Services, Inc.*, 19 F.3d 359 (7th Cir. 1994) at D.C. 12-14. The District Court also noted the Petitioner's "unavailing" reliance on *Hardwick v. Sherwin Williams Co.*, No. 81575, 2002 Ohio App. LEXIS 7273 (Ct. App. Feb. 13, 2002), as that case involved an agreement under which only the employees, and not the employer, were bound to arbitrate disputes, and did not require acceptance of the agreement by continued employment, or even condition employment upon acceptance of the agreement. (D.C. 14, n.7). Nevertheless, Petitioner cited to *Hardwick* in her Petition, failing again to mention these fatal differences. (Pet. 23).

In her attempt to challenge its proper application below, Petitioner went on to mischaracterize Ohio law, blatantly misstating it in several places. For example, although she states that "Ohio law dictates that there is a presumption against forced arbitration of claims if the employee or party has not signed an agreement" (Pet. 22), neither of the two cases she cites to support this proposition (*Council of Smaller Enterprises v. Gates, McDonald & Co.*, 687 N.E.2d 1352, 1356-1357 (Ohio 1998); *Benjamin v. Pipoly*, 800 N.E.2d 50 (Ohio Ct. App. 2003)) involved either the employment context or an agreement such as the DRP which does *not require* an employee's signature for acceptance, but instead defines continued employment after a specified date as acceptance. As the District Court properly corrected her in its decision, under Ohio law, "[t]here is no requirement that an arbitration agreement be signed in order to be valid and enforceable," and, unlike Petitioner, the District Court cited to relevant Ohio authority on point, *Brumm v. McDonald & Company Securities, Inc.*, 603 N.E.2d 1141 (Ohio Ct. App. 1992). *See also Ross v. Bridgewater Constr., Inc.*, Ct.App.No.L-03-1029, 2003 Ohio App. LEXIS 5552 at **5 (Ct. App. Nov. 21, 2003) (citing *Med. Dev. Corp. v. Indus. Molding Corp.*, 479 F.2d 345, 348 (10th Cir. 1973), and *Fisser v. Internatl. Bank*, 282 F.2d 231, 233 (2d Cir. 1960)) (observing that both Ohio and federal courts "have consistently held that to enforce an arbitration clause it is only necessary that the provision be in writing, and that it is not required that such writing be signed").

Petitioner mischaracterizes the record below by stating that "[i]n Petitioner's case . . . there was a question as to the formation of an arbitration agreement." (Pet. 23). The District Court held expressly to the contrary "as a matter of law" (D.C. 17), and the Sixth Circuit properly upheld this legal

conclusion, holding that, "even under Dantz's version of the facts in her appellate briefs" — which, as discussed below, contained much extraneous and erroneous information which had not been part of the District Court record, and thus not properly subject to consideration upon review — there was no issue as to Petitioner's assent to the agreement, and thus an agreement was formed as a matter of law. (C.A. 9, 13). The lack of any legal question as to the formation of the agreement made a jury trial unnecessary, and Petitioner's attempt in her third Question Presented for Review to misstate the law and its application in the record must fail.

II. The Petition Misstates the Record Below, and Raises No Basis For Review of the District Court's Proper Application of the Law.

According to Supreme Court Rule 10, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings." Although Petitioner does not frame the issue as such in any of her Questions Presented for Review, her Statement of the Case and Facts and her Reasons for Granting the Petition make clear that the sole purpose of her Petition is to challenge the factual conclusions of the District Court below. What is worse, Petitioner attempts to add "facts" and contentions that were not included in the record at the District Court level, and thus are not subject to review by this Court even if it took on the task of assessing the factual findings below.

One of the cornerstones of appellate review is that the record available for consideration by an appellate court is limited to the record developed at the trial court level below; the appellate court may not — and should not, for reasons of finality and efficiency — consider facts outside of the trial

court's record. *See, e.g., Maryland Casualty Co. v. Jones*, 279 U.S. 792, 796 (1929) (refusing to consider a document because it was outside "[t]he record, to whose consideration we are limited" and "cannot be looked to by us"); *Winters v. Pacific Gas & Elec. Co.*, No. 98-17136, 2000 U.S. App. LEXIS 5935 at *4-5 (9th Cir. Mar. 20, 2000) ("We have considered and deny Winters's motion to supplement the record with documents that were not created until after the grant of summary judgment as our review is limited to the record before the district court"); *Tonry v. Security Experts, Inc.*, 20 F.3d 967, 974 (9th Cir. 1994) ("Parties may not unilaterally supplement the record on appeal with evidence not reviewed by the court below."). In this case, review by both the Sixth Circuit and this Court is limited to consideration of the record as it existed below before District Court Judge Dowd.

Petitioner begins her Petition with a long description of what she purports are the underlying "facts" of the case. However, most of these irrelevant "facts" were not included in the record below and are thus not subject to review by this Court. The documents containing the factual record before District Court Judge Dowd were the Complaint, the Answer, the Company's Motion to Stay (to which the Company's copy of the DRP and the Strang Memorandum were attached as exhibits), Petitioner's Response to the Motion to Stay (to which Petitioner's purported copy of the DRP, which was in actuality a later version of the DRP, was attached as an exhibit), the Affidavit of Seta Tchobanian (to which the form Petitioner "refused to sign" was purportedly attached as an exhibit[11]), and the Company's

11. This form is incorporated into the record by reference and description in the Affidavit. See Pet. 8 for a reproduction of this form.

Reply Memorandum in Support of Motion to Stay. As such, Judge Dowd was limited to these documents[12] in finding facts and rendering his decision, and subsequent consideration of that decision must be confined to this same record.

In both her filings with the Sixth Circuit and in her Petition to this Court, Petitioner did not, in fact, limit herself to the record presented to the District Court. Her efforts to include additional, and often conflicting[13] facts to the Sixth

---

12. In discerning Petitioner's position, the District Court was limited to relying on the facts of the case as they were averred by Petitioner's counsel, as Petitioner did not enter any affidavits, including her own, into the record before Judge Dowd.

13. The Sixth Circuit took explicit notice of Petitioner's addition of inconsistent claims on appeal, specifically noting that although she alleged in her Complaint that she received a copy of the DRP in the fall of 2001, she claimed on appeal not to have received a copy of the DRP until June of 2002. (C.A. 2, n.1; 9, n.5). While acknowledging Petitioner's attempt to add to the record, the Sixth Circuit properly limited the scope of its review, finding that "the record before us does not give us cause to find that the district court's understanding of the underlying facts was clearly erroneous", and adopted the District Court's understanding of the factual record. (C.A. 2).

Amazingly, in her Petition, Petitioner changes her story yet again, now claiming that she *never* received a "full" DRP booklet, but only received the two-page agreement form attached to the later version of the DRP booklet. (Pet. 7, 11). Not only is this newest contention undercut by the very copy of the DRP which she submitted to the District Court (see Petitioner's Response to the Motion to Stay, Ex. A at 1, on which the words "I refused to sign this" are scrawled on the *front* of the DRP booklet, indicating that she was, in

(Cont'd)

Circuit fell flat, as the Sixth Circuit noted her attempt to add to the record on appeal, then explicitly adopted Judge Dowd's "understanding of the underlying facts" of the case. (C.A. 2). Moreover, as Petitioner alludes in her Petition, the Sixth Circuit went even further in its ruling, finding that a valid agreement to arbitrate had been formed, "even under Dantz's version of facts in her appellate briefs." (C.A. 9, n.5). Thus, the "facts" that she attempted to add to the record on appeal, beyond not being the proper subject for review on appeal, did nothing to improve her case.

For the purposes of considering this Petition, the Court must have an accurate idea of the record that is properly before it. Unfortunately, it cannot depend on the Petitioner's Statement of the Case and Facts for this purpose. The background information regarding Petitioner's family life, her financial situation, and any allegations against the Company or any of its representatives that were not included in her Complaint before Judge Dowd or otherwise presented to the District Court, are not properly before this Court because they are not supported by any record evidence. Nevertheless, Petitioner dedicated several pages of her Petition to such irrelevant information merely for its inflammatory effect. (Pet. 1-4). Indeed, as both courts have found, Petitioner's claims against the Company are subject to arbitration, so the merits of her underlying allegations have not yet been addressed by any tribunal, and are immaterial to this Court in its consideration of this Petition. Rather, her appeal concerns only the enforceability of the DRP.

(Cont'd)

fact, given the booklet and not just the agreement attached at the *back* of the booklet), it demonstrates her shifting and internally inconsistent version of the "facts" in this litigation, and her attempt to impermissibly add to the record below to suit her purposes before this Court.

The extent of Petitioner's mischaracterization of the record below with respect to the DRP is best illustrated by her most blatant omission. She quotes extensively from what she purports to be the DRP, leading this Court to assume that there was no dispute as to the language of the agreement at issue. (Pet. 5-7). However, she makes no mention of the fact that she submitted to the District Court a different version of the DRP (*see* Petitioner's Response to the Motion to Stay, Ex. 1) than that submitted by the Company (*see* Motion to Stay, Ex. A). The relevant difference between these two versions of the DRP is that the version submitted by Petitioner included an additional two-page "agreement" form at the end of the DRP booklet which contained the language cited in Petitioner's Statement of the Case and Facts referring to the *signing* of the DRP by employees. (Pet. 6-7). The version of the DRP submitted by the Company — the agreement to which both the District Court and the Sixth Circuit found that Petitioner had assented — *does not contain this additional two-page agreement, and thus does not contain this "employee signature" language. See* D.C. at 3, 4, 5, 18, 20 (referencing the Company's version of the DRP); C.A. 2, 4-5. Yet, the Petitioner makes no mention in her Petition that she is quoting from a document that both courts below found to have no bearing on her claim, and does not even alert this Court to the fact that there were conflicting versions of the DRP presented below.[14]

---

14. In a related misstatement, Petitioner declares that "[e]ach and every other server at the restaurant had signed the agreement." (Pet. 7). This statement is not supported by any evidence in the record, and besides, is false in light of the fact that the "agreement" to which she refers is *her* version, the one containing the two-page agreement form. However, the distinction between the two versions of the agreement is largely irrelevant for purposes of this Petition, as the

(Cont'd)

Petitioner goes on to present "facts" to this Court that are nowhere to be found in the record below, including a description of the Company's alleged attempts to obtain her signature on the DRP (Pet. 8-9), her contention that she requested and was denied additional discovery at the district court level (Pet. 10), and an extended discussion of a completely separate lawsuit which she has filed against the Company (Pet. 10-11, n.7).[15] Finally, in a desperate attempt to reargue the facts of the case, Petitioner makes several claims that the Company's evidence and/or statements were "false" — even though the District Court adopted the evidence and statements at issue as fact and the Sixth Circuit affirmed these findings. (Pet. 10-11). Most incredibly, Petitioner now makes the claims that she "never received an entire DRP" — a claim directly at odds with her shifting contentions below, first that she had received the DRP in the fall of 2001, and then that she had received the DRP in

---

(Cont'd)

District Court found that Petitioner entered into the DRP that did not include the additional two-page agreement, and the Sixth Circuit agreed, and then further held that Petitioner would have been bound under the terms of *either* version of the agreement.

15. Petitioner laments in her Petition that the Sixth Circuit refused to consider the record in this other case as it was deciding her appeal of this case below. (Pet. 5, n.4; 10-11, n.7; 12). This objection to the Sixth Circuit's proper limiting of its consideration to the record of the case before Judge Dowd demonstrates Petitioner's basic misunderstanding of the function of appellate courts. As is the Court in this case, the Sixth Circuit was limited to considering the record of the District Court below. *Maryland Casualty Co. v. Jones*, 279 U.S. 792, 796 (1929); *Winters v. Pacific Gas & Elec. Co.*, No. 98-17136, 2000 U.S. App. LEXIS 5935 at *4-5 (9th Cir. Mar. 20, 2000); *Tonry v. Security Experts, Inc.*, 20 F.3d 967, 974 (9th Cir. 1994). Consideration by the Sixth Circuit of evidence not presented to the District Court, and indeed from the record of a completely separate lawsuit, would have been improper.

June of 2002 (see C.A. 2, n.1) — and that she has since "learned" that the Strang Memorandum was "in fact never sent to employees". (Pet. 10, n.7, 11, 12). These statements, aside from being completely false, are not supported by record evidence below, and thus are not relevant for consideration before this Court.

The record below is clear that the relevant law was correctly applied to the facts, and that Petitioner is bound to arbitrate her claims against the Company. Notwithstanding her attempts now to add "facts" to the record and mischaracterize the proceedings and holdings below, Petitioner has presented this Court with no basis for granting her Petition for review of this case.

CONCLUSION

For all of the foregoing reasons, Petitioner has failed to provide a basis for this Court to review this case. As such, Respondent respectfully urges this Court to deny the Petition.

Respectfully submitted,

TODD F. PALMER*
W. ERIC BAISDEN
LAURA K. KENDALL
CALFEE, HALTER & GRISWOLD LLP
1400 McDonald Investment Center
800 Superior Avenue
Cleveland, Ohio 44114-2688
(216) 622-8200

Attorneys for Respondent

* *Counsel of Record*